Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

MACRO ENERGY, INC. and SHIGEMI YAMAGISHI,
Petitioners,
vs.
RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Court of Appeals err by dismissing petitioners' appeal from the Decision and Order of the Supreme Court of the Commonwealth of the Northern Mariana Islands ("CNMI") for lack of jurisdiction?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, MACRO ENERGY, INC. and SHIGEMI YAMAGISHI respectfully petition that a Writ Of Certiorari issue to review the judgment and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 21, 1994.

ORDER

The Order of the Court of Appeals is unreported but appears in the Appendix at 1j ("app." lj).

JURISDICTION

The Order of the Court of Appeals for the Ninth Circuit was entered on July 21, 1994. This Petition for a Writ Of Certiorari has been filed within 90 days of that date. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant sections of Amendment XIV to the United States Constitution are as follows:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of 48 U.S.C. § 1694c(a) are as follows:

> (a) The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matter or proceedings shall be governed by the laws of the United States including the Supreme Court of the United States, pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant [48 U.S.C. § 1681 note]: Provided That for the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States court of appeals for the judicial circuit which includes the Northern Mariana Islands shall have jurisdiction of

> appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to section 3 of this Act [48 U.S.C. § 1694b].

The relevant portions of Section 501(a) of the covenant to establish a commonwealth of the Northern Mariana Islands in political union with the United States of America ["the covenant"], Article V read as follows:

> (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states: Article I, section 9, clauses 2, 3, and 8; Article I, section 10, clauses 1 and 3; Article IV, sections 1 and 2, clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, section 1; Amendment 15; Amendment 19; Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States. (Codified in 48 U.S.C. § 1681 (1994))

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiff: Ryoko Ito, as Personal Representative of the heirs of Akinobu Ito, Deceased.

Defendants: Macro Energy, Inc., Marianas Ocean Enterprises, Nobuo Hirai, Shigemi Yamagishi, and American Home Assurance Company.

STATEMENT OF THE CASE

The question raised by this Petition stems from a wrongful death action entitled *Ryoko Ito v. Macro Energy, Inc., Marianas Ocean Enterprises, Nobuo Hirai, Shigemi Yamagishi, American Home Assurance Company*[1] filed on September 14, 1989 in the Superior Court of the Commonwealth of the Northern Mariana Islands ("CNMI") (app. 1a). This action was initiated by the heirs of Akinobu Ito who died in a September 24, 1988 scuba diving accident.

On November 7, 1990, Petitioners and other defendants[2] moved for summary judgment asserting that a release agreement signed by the decedent effectively shielded each of

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[1]American Home Assurance Company, Macro and Yamagishi's insurer, was named as a defendant in this action pursuant to the Commonwealth's direct action statute 4 CMC §7502(e).

[2]The defendants included Macro, American Home, Yamagishi and Hirai.

them from liability. After full hearing, the trial judge granted that motion and ordered summary judgment be entered in favor of Macro, Hirai, Yamagishi and American Home Assurance Company (app. 1b).

Thereafter, plaintiff moved for reconsideration of that Order. The trial court then entered an "Amended Summary Judgment" and "Memorandum Decision" which held that Yamagishi and Hirai (Macro's employees) were not released from liability (app. 1d, 1e-4e). The judgment in favor of the remaining parties including Petitioner Macro remained undisturbed. *Id.*

Following a jury trial, in which Macro did not appear or participate, judgment was entered against Hirai, Yamagishi and American Home[3] in the approximate sum of $2.4 million on June 22, 1992 (app. 1f). Yamagishi and Hirai then appealed the judgment to the Supreme Court of the CNMI.

That appeal contested various findings of the trial court including the trial court's decision that the Release was ineffective as to Yamagishi and Hirai (see, app. 15h). The plaintiff cross appealed and, *inter alia* challenged the trial court's determination that the Release was effective as to Petitioner Macro. *Id.*

On appeal, the Supreme Court *sua sponte* requested and received supplemental briefing as to the effect of a reversal of the trial court's summary judgment in favor of Petitioner Macro on the release issue. In their supplemental briefing, Petitioners argued that due process considerations required that in the event the Supreme Court was inclined to reverse the judgment in favor of Macro, a new trial was required as to all defendants because Macro certainly had not participated in the original trial. Plaintiffs argued that the appro-

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[3]On August 10, 1992 after motion by American Home (as Yamagishi's insurer), the trial court issued an amended judgment limiting American Home's liability for damages to $100,000 (app. 5h).

priate procedure after reversal of the summary judgment in favor of Macro would be to simply enter final judgment against Macro in the amount of the judgment entered against Yamagishi and Hirai.

On October 26, 1993, the Supreme Court of the CNMI reversed the trial court in part, concluding that the release was invalid in its entirety and accordingly, the trial court's judgment in favor of Macro was reversed (app. 1g, 24h-25h). The Supreme Court also rejected the due process arguments advanced by Petitioners and remanded the matter to the trial court with instructions to simply enter judgment against Macro in the amount of the verdict, $2,434,857.55. *Id.*

On November 8, 1993, Macro along with Yamagishi and the other defendants, petitioned the Supreme Court of the CNMI for Rehearing arguing *inter alia*, that federal due process considerations required, at a minimum, Macro be afforded a trial on the merits before judgment could be entered. This petition was denied on November 23, 1993 (app. 1i).

On or about March 26, 1993, Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 48 U.S.C. § 1694c(a). On July 21, 1994, the Court of Appeals entered its Order dismissing the consolidated appeals because "this is not a case 'involving the Constitution, treaties, or laws of the United States' " (app. 1j).[4]

This Petition for a Writ of Certiorari seeks an order granting the petition and an order remanding the matter to the Court of Appeals for full appellate review.

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[4]An appeal was also taken by Nobuo Hirai and that appeal was likewise dismissed for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

A. THE LOWER COURT ERRED IN DISMISSING THE PETITIONER'S APPEAL FOR LACK OF JURISDICTION.

The Supreme Court of the CNMI ordered judgment in the amount of approximately $2.4 million be entered against Petitioner Macro despite the facts that Petitioner Macro (a) had been judicially found to be free from liability prior to trial (app. 1b, 1d); (b) did not appear or participate in the trial (app. 5h-6h); and (c) the jury made no findings concerning Macro (app. 6h-14h). In short, the Supreme Court imposed liability and judgment in this case upon Petitioner Macro without benefit of trial.[5]

The applicability of the due process clause of the Fourteenth Amendment of the United States Constitution in the territory of the CNMI is specifically provided for in Section 501(a) Article V of the covenant (also codified in 48 U.S.C. § 1681 (1994)). See also: *Commonwealth of Northern Mariana Islands v. Atalig*, 733 F.2d 682, 690 n.26 (9th Cir. 1984). The Supreme Court of CNMI here, *sub silento* concluded nevertheless that a trial in Petitioner Macro's case was not required in order to enter judgment against it (app. 54h-55h).

The appeal from this order to the Court of Appeals is statutorily permitted by 48 U.S.C. § 1694c(a). Indeed, the lower court has over the years recognized that the scope of its jurisdiction is, to a large extent, statutorily predicated upon the forum on which the litigation originates. Thus, the court has noted that its jurisdiction encompasses review of

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[5]The Supreme Court reversed the trial court finding that Petitioner Macro was shielded from liability by virtue of a release and upon making this finding, remanded the matter to the trial court with specific instructions to enter judgment against Macro. (app. 1g, 24h-25h)

even "local questions" when the question arises in a case which originated in the trial division of the Federal District Court of the CNMI[6] and the appeal is thus maintained under 48 U.S.C. § 1694c(a). Generally, *Wabol v. Villacrusis,* 958 F.2d 1450, 1454 (9th Cir. 1992).

On the other hand, cases such as the one at bar, originating in the local courts and reviewed in the CNMI Supreme Court, are only reviewable in the Court of Appeals for the Ninth Circuit when the case presents a "... case [ ] involving the Constitution, treaties, or laws of the United States...." 48 U.S.C. § 1694c(a).

The lower court's refusal to review Petitioner's appeal is, however, contrary to this statutory authority as well as principles underlying the orderly administration of justice in the CNMI. As it stands, the summary dismissal of this appeal effectively precludes *any* appellate review of this CNMI judicial determination on a clear constitutional issue. In this case, the constitutional question did not arise until post trial review in the Supreme Court of the CNMI. And, at that, the issue was raised *sua sponte* by the Supreme Court when the parties were requested to provide supplemental briefing on the effect of a finding that the trial court had erroneously entered judgment in favor of Petitioner Macro.[7] Following briefing on that issue, the Supreme Court then simply ordered that judgment be entered against Petitioner Macro without mention of the constitutional implications of its order (app. 1g, 54h-55h).

The order dismissing Petitioners' appeal fails to recognize that the procedural path of the proceedings in the CNMI presents no less of a "... case [ ] involving the Constitu-

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[6]A district court for the CNMI was established by act of Congress in 1977 (Public Law No. 95-157, 91 Statt 1266).

[7]This was not reduced to formal order but is recorded in transcripts of these proceedings which are not included with the appendix.

tion . . ." than the issue of a criminal defendant's right to trial by jury in the CNMI. See, e.g., *Commonwealth of Northern Mariana Islands v. Atalig, supra.*[8] It is inconsequential, for purposes of jurisdiction, that the constitutional issue surfaced not by the pleadings at issue, but rather by the appellate disposition of the case in the Supreme Court of the CNMI.

While there may be debate over the procedures required to give meaning to Petitioners' due process rights under the circumstances of this case, there is no doubt that liability has been imposed upon Petitioner Macro without a trial. This alone in our view presents a sufficient jurisdictional basis for appellate review of these proceedings in the Court of Appeals. Indeed, the Ninth Circuit has in another case itself noted that while "the jury trial guarantee is primarily a procedural right [it is] designed to safeguard the broader and more fundamental right to a fair trial protected by the due process clause." *Wabol v. Villa crusis, supra,* 958 F.2d at 1460.[9] In that case, the Court of Appeals went on and concluded that ". . . it is 'easy to imagine' a system that omits the safeguard [trial by jury] but through other mechanisms, nevertheless achieves the broader non-waivable goal of assuring a fundamentally fair trial." *Id.*

In our view, the circumstances in this case, particularly the Appellate challenge to the CNMI Supreme Court's *sua sponte* joinder and imposition of judgment upon a party without trial, manifestly presents a case involving the Constitution of the United States. Moreover, a review of the legislative scheme allowing for the genesis and evolution of the federal and local judicial systems in the CNMI carefully

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[8]The appeal in *Atalig* was brought pursuant to 48 U.S.C. § 1694c(b).

[9]In *Wabol, supra,* the Court of Appeals considered the scope of the Sixth Amendment's right to trial by jury in criminal cases for the residents of the CNMI.

assures the availability of appellate review to all litigants, which guarantee will be lost to Petitioner Macro absent the granting of this Writ. See generally: *Wabol, supra; Camacho v. Civil Service Commission,* 666 F.2d 1257 (9th Cir. 1988); compare; *Sablan v. Manglona,* 938 F.2d 970 (9th Cir. 1991). In short, Petitioner Macro's only pertinent participation in this matter occurred when the Supreme Court of the CNMI ordered the trial court to enter judgment against Macro over its objection and insistence upon its constitutional right to trial. Petitioners now find themselves without any court to review these proceedings, which is inconsistent with the scheme underlying the judicial system established in the CNMI, not to mention fundamental notions of fairness guaranteed to all litigants in the CNMI.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Petition for a Writ Of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit and remand this matter to the Court of Appeals for appellate review of the decision of the Supreme Court of the CNMI.

Dated: October 18, 1994

Respectfully submitted,

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By: NORMAN J. WATKINS
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APPENDIX A

APPENDIX A

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CIVIL ACTION NO.

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

vs.

MACRO ENERGY, INC., MARIANAS OCEAN
ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI,
and AMERICAN HOME INSURANCE CO.
Defendants.

COMPLAINT

JURISDICTION

1. This Court has jurisdiction pursuant to the Commonwealth Judicial Reorganization Act of 1989.

2. This is an action for the wrongful death of Akinobu Ito hereinafter referred to as "ITO" brought by Ryoko Ito as the personal representative hereinafter referred to as Plain-

tiff, that occurred while Ito was on a scuba diving tour organized, supervised and under the complete control of Marianas Ocean Enterprises Inc., acting through its alter ego Macro Energy, Inc. and employees and or officers Shigemi Yamagishi and Nobuo Hirai.

3. Plaintiff Ryoko Ito is of age and the widow of the deceased and the mother of the two children of the deceased.

4. At all times relevant hereto defendant Macro Energy, Inc. (MEI) was a corporation organized and existing under the laws of the Commonwealth of the Northern Marianas, acting as the alter ego of defendant Marianas Ocean Enterprises, Inc.

5. At all times relevant hereto defendant Marianas Ocean Enterprises, Inc. (MOE) was a corporation organized and existing under the laws of the Commonwealth of the Northern Marianas.

6. At all times relevant hereto defendant Nobuo Hirai (Hirai) was employed by either MOE or MEI or both as a diving instructor and guide.

7. At all times relevant hereto, defendant Shigemi Yamagishi was an officer, director and/or employee of MOE and or MEI.

8. In June, 1989, the decedent Akinobu Ito enrolled in a scuba diving class conducted by the defendants for the purpose of obtaining a license or certification as a scuba diver.

9. Defendants MOE and or MEI accepted compensation of and undertook to train Ito as a scuba diver.

10. Despite receiving compensation for and undertaking to train Ito as a scuba diver, the defendants were grossly deficient in the instruction which fell far below the standard

accepted in the scuba diving industry as adequate for certification as a scuba diver.

11. In September, 1988, Ito, in the company of fellow employees returned to Saipan for the purpose of engaging in scuba diving.

12. Despite the fact that defendants were aware that Ito had had only the most rudimentary instruction in scuba diving, they accepted compensation to guide him on a scuba diving tour of a place known as the Grotto, a place suitable only for experienced divers.

13. Defendants also accepted compensation for the rental of scuba diving equipment which they warranted to be fit for its intended use.

14. The dive commenced and the divers all descended into the Grotto and proceeded through an underwater tunnel to the ocean outside.

15. Shortly thereafter, Yasuharu Fujitomi (Fujitomi) the dive partner of Ito signaled that he was out of air and rose to the surface. Ito and Hirai followed him up.

16. At the surface, Hirai found no air coming out of Fujitomi's regulator and instructed him to descend breathing from Hirai's alternate air source known as an octopus.

17. The three descended and proceeded to the tunnel entrance to return to the Grotto pool.

18. At the entrance to the tunnel, Hirai checked Ito's air pressure gauge to determine how much air he had and the gauge read less than 500 pounds.

19. The three proceeded into the tunnel and shortly thereafter Ito signaled that he had no air.

20. Hirai and Fujitomi proceeded through the tunnel and emerged safely at the surface without Ito. Hirai then re-

turned underwater and brought Ito to the surface and out of the water.

21. Cardio pulmonary resuscitation and mouth to mouth resuscitation was initiated to no avail and Ito was pronounced dead at the Commonwealth Health Center.

I.

22. Plaintiff realleges and repeats each and every allegation of paragraphs 1 through 21 of the complaint.

23. In June, 1988, Ito enrolled in a scuba diving instruction course and for a fee duly paid to the defendants, the defendants agreed to furnish Ito with scuba diving instruction to enable him to obtain a scuba diving license and safely engage in the sport of scuba diving. Defendants had a duty to adequately instruct Ito so that he could safely engage in the sport of scuba diving.

24. In June, 1988, the defendants instructed Ito in scuba diving and awarded him a certification card assuring him that he was now adequately trained to safely engage in the sport of scuba diving.

25. Defendants failed to give the time and attention necessary to adequately train the decedent and failed to give sufficient instruction or adhere to the standards of scuba diving instruction which would insure that Ito could safely engage in the sport of scuba diving.

26. Defendants' negligence included but is not limited to the following:

(1) failing to hire competent instructors;

(2) failing to instruct Ito in emergency procedures;

(3) failing to instruct Ito in alternative air source breathing techniques;

(4) failing to provide sufficient classroom instruction; and

(5) failing to provide sufficient practical instruction.

27. The above described negligence was a proximate cause of the death of Akinobu Ito and he was not contributory negligent.

28. As a direct and proximate result of the negligence of the defendants described herein, plaintiff Ryoko Ito, wife of decedent and the minor children of decedent Ito and Ryoko, all of whom were being supported by the decedent prior to the time of the injury, were deprived of the decedent's financial support and the children who lived with the decedent prior to the time of the injury were deprived of the help, company, love, affection and consortium of the decedent.

II.

29. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 28.

30. Defendant Shigemi Yamagishi at all times relevant was an officer and or a director of defendant's MEI and/or MOE, defendant Hirai was at all times relevant an employee of MEI and/or MOE, at the time and place of the events relevant hereto the defendants and each of them, were members of and engaged in a joint venture or common enterprise.

31. On September 22, 1988, Ito went to the dive shop of MEI and/or MOE for the purpose of obtaining a guide for a scuba diving tour and renting scuba diving equipment and for monetary consideration, duly paid by Ito, defendants agreed to rent him scuba diving equipment, and suggested that he join a scuba diving tour that was diving the Grotto, promising to provide a guide who would give his time and attention to insure a safe dive.

32. The defendants each and all of them were negligent in discharging their duty to the decedent in the following respects:

(1) in recommending a scuba dive that was suitable only for advanced divers and far above the ability of the decedent, which was known to them.

(2) providing incompetent guides.

(3) failing to provide adequate safety instructions.

(4) providing defective equipment which both leaked air and provided the decedent with a false reading of the amount of air left remaining to him.

(5) failing to follow proper safety and emergency procedures during the dive.

33. The above described negligence was a proximate cause of the death of Akinobu Ito, and he was not contributory negligent.

34. As a direct and proximate result of the negligence of the defendants described herein, plaintiff Ryoko Ito, wife of decedent and the minor children of decedent Ito and Ryoko, all of whom were being supported by the decedent prior to the time of the injury, were deprived of the decedent's financial support and the children who lived with the decedent prior to the time of the injury were deprived of the care, guidance, support, love, and affection of the decedent and plaintiff Ryoko Ito, the wife of the decedent was deprived of the help, company, love, affection and consortium of the decedent.

III.

35. Plaintiff realleges and repeats each and every allegation of paragraphs 1 through 34 of the complaint.

36. On or about September 22, 1988, defendants were each and all of them insured by a public liability insurance policy issued by American Home Insurance company covering liability and damages caused during the operation of their scuba diving instruction and tours.

37. Pursuant to the coverage contained in the said insurance policy and pursuant to the laws of the Commonwealth of the Northern Mariana Islands, plaintiff is entitled to maintain a direct action against defendants American Home Insurance Company and to recover against said insurance carrier in an amount equal to any judgment recovered against defendants.

IV.

38. Plaintiff realleges and repeats each and every allegation of paragraphs 1 through 37 of the complaint.

39. Defendant MEI is and at all times mentioned was the alter ego of defendant MOE, and there exists and at all times herein mentioned has existed, a unity of interest and ownership between defendants such that any separateness between them has ceased to exist, in that defendant MOE completely controlled, dominated, managed, and operated both corporate defendants and intermingled the assets of each to suit the convenience of MOE by intermingling the funds of both companies and failing to observe any corporate formalities or have any separate accounts or meetings.

40. Defendant MOE operated its business through its alter ego MEI in order to avoid potential liability and to avoid creditors, and all claims of corporate separateness are a sham.

41. Defendants MEI and MOE are both responsible for the acts alleged herein.

WHEREFORE, Plaintiff prays for the judgment against Defendants individually, jointly and severally as follows:

1. For general damages according to proof.

2. For damages as alleged above by the widow for loss of maintenance, support, counsel and affection in an amount to be determined at trial;

3. For damages and loss as described above for the two children, in an amount to be determined at trial;

4. For costs and attorney's fees due to the gross and negligent conduct of the Defendants in causing the death of the Akinobu Ito.

5. For such other and further relief as the Court may deem proper.

Dated this 14th day of September, 1989.

FITZGERALD, HERALD & BERGSMA
Attorneys at Law

By: _____
WILLIAM M. FITZGERALD

APPENDIX B

APPENDIX B

Filed December 17, 1990
Clerk, Superior Court

CIVIL ACTION NO. 89-918

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

vs.

MACRO ENERGY, INC., MARIANAS OCEAN
ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI,
and AMERICAN HOME INSURANCE CO.,
Defendants.

SUMMARY JUDGMENT

Pursuant to the Memorandum Decision entered this date;

IT IS ADJUDGED the plaintiff take nothing by her complaint against Macro Energy, Inc., Nobuo Hirai, Shigemi Yamagishi, and American Home Insurance Co. Defendants are entitled to their court costs.

Dated at Saipan, MP, this 17th day of December, 1990.

Robert A. Hefner, Presiding Judge

APPENDIX C

APPENDIX C

CIVIL ACTION NO. 89-918

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

VS.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO.
Defendants.

MEMORANDUM DECISION

FACTS[1]

In June of 1988, the decedent, Akinobu Ito became a certified scuba diver after successfully completing an instruction course sponsored by a Japanese scuba diving sanctioning organization known as "A.D.S. Japan" and taught by defendant Shigemi Yamagishi, president of defendant Macro Energy, Inc. (Macro) in Saipan. Ito's instruction included 10 hours of classroom instruction, a minimum of 3 hours in the water with scuba gear and a written test. In the first session of the course, students are taught how to fit their masks and regulators and how to clear their ears and

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[1]These facts (except for those relating to Ito's initial visit to Saipan) are taken from defendants' memorandum in support of their motion for summary judgment, pp. 6-11. The plaintiff does not dispute these facts. See, plaintiff's memorandum in opposition to defendants' motion.

masks while wearing full scuba gear. The second session consists of diving, underwater stabilization, ascension, proper wearing of the gear and "buddy breathing." Ito was also taught how to make an "emergency ascent" in an "out-of-air" situation. The A.D.S. certification contains no restriction preventing certified divers from diving in caves or tunnels.

Upon completion of the certification course, Ito and his friend, Yosuhiro Fujitomi went on a guided dive of Saipan's Grotto without incident.[2]

Several months later on September 24, 1988, Ito, and several of his friends including Fujitomi returned to Saipan and went to Macro to sign-up for a guided dive of Saipan's Grotto taking place that day. Macro's professional dive instructors, defendants Yamagishi and Nabuo Hirai, were to act as guides and supervise the dive.

While at Macro, Ito was asked to read and sign an "Agreement for Exemption from Obligation" (Exemption Agreement) included in an Application for Scuba Diving and Invoice prepared by Macro. Ito signed and dated the Exemption Agreement. The terms of the Exemption Agreement were printed in both Japanese and English. The terms, as printed in English are reprinted verbatim as follows:

> I submitted an application for participating in the diving tour and or training program to be conducted by your agency. I fully accept and understand that such a diving tour and training involves basic risk and danger. If we fail to abide by the rules and regulations set by the guides and instructors and if we neglect the diving rules, we realize that we may risk our lives. All the risks

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[2]The Grotto is a popular Saipan dive spot which is essentially a small pool surrounded by natural rock formations. Those diving the Grotto enter the pool and descend approximately 30 meters to the bottom and enter any of three tunnels leading to the open ocean.

that we may have during the period of stay here belong to each of us personally. In case of accident, causing injury or death to myself, I myself, my family, or inherited organization and other related personnel shall have no right to protest against nor to claim for damages. We hereby swear to abide by and act at the rules and instructions set by the guides and instructors. Also I am fully a grown up at law and I acknowledge the fact that I am fully qualified to sign this agreement, to verify the exemptions from all the claims for damages. All the items in this application are to be decided by the agreement, and I personally sign this document at my own will rather than someone directing me to sign this paper.

There were 15 divers, including Ito and his friends who were to be guided by Yamagishi and Hirai at this particular dive at the Grotto. Ito rented his scuba gear from Macro. All of the divers assembled and inspected their scuba gear at Macro's shop before leaving for the Grotto. The equipment inspection included an air check of the tanks. Ito and his dive "buddy" Fujitomi complained about a noise coming from Ito's gear but this noise was determined not to be a problem by Hirai.

Upon arriving at the Grotto and after a briefing by Yamagishi, Ito and the other divers entered the Grotto's pool accompanied by Hirai and Yamagishi. At the surface of the pool, one of the group could not clear her ears and was told to remain on the surface. The remaining group members then descended to the bottom of the Grotto with Yamagishi in the lead and Hirai in the rear. The group entered the center tunnel of the Grotto, exited at the other end and proceeded to an area approximately 20 meters deep whereupon Yamagishi checked the group's air gauges. After the air check, the group proceeded back to the tunnel.

At this point, Hirai noticed Fujitomi having problems with his regulator and went to assist him. Fujitomi headed for the surface followed by Ito, despite Hirai's signals to remain below.

Upon reaching Fujitomi, Hirai gave him his main regulator and used one of the two spare regulators included in his gear for his own air supply.[3] At the surface, Hirai tested Fujitomi's regulator and found it difficult to breathe from. Hirai then gave Fujitomi the spare regulator and took his own regulator back from Fujitomi. The three divers then descended and headed back to the tunnel entrance. At this point Ito had between 400 to 500 pounds of air remaining in his tank while Hirai's own tank had approximately 1,500 pounds of air remaining. According to Hirai, Ito had, "plenty of air to return by."

Upon entering the tunnel with Fujitomi and Ito, Hirai began to pull himself along the tunnel wall with his right arm while holding Fujitomi with his left arm. At this point Ito was moving along the wall with Hirai and Fujitomi. Approximately midway through the tunnel, Ito signalled Hirai that he was out of air whereupon Hirai gave Ito his main regulator. After ensuring that Ito was breathing through the regulator, Hirai, now using the second spare regulator, continued along the wall. Hirai last confirmed Ito's presence at about 10 feet from the pool's surface. At the surface, Hirai discovered that Ito was not with him. Looking underwater, Hirai saw Ito hovering approximately 10 feet below. Hirai descended and brought Ito to the surface where efforts to revive him failed. The Certificate of

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[3]Although it is unclear from the deposition testimony, at some point during the ascent to the surface, Hirai signalled to Yamagishi that things were "O.K." Upon receiving this signal from Hirai, Yamagishi took the remaining 12 divers back through the tunnel and up to the pool's surface.

Death states the cause of death as "asphyxia due to drowning."

PLEADINGS

The plaintiff, Ryoko Ito, decedent Ito's wife, subsequently filed this wrongful death action as personal representative of the deceased. The complaint alleged negligence on the part of Macro in two counts. The first count alleges that Macro failed to provide adequate instruction and train the decedent in the sport of scuba diving while the second count alleges a breach of Macro's duty to recommend a safe place to dive, provide competent guides and properly working equipment, and follow proper safety and emergency procedures during the dive. The third and fourth counts are drafted to extend liability to Marianas Ocean Enterprises (MOE) as the alter ego of Macro and American Home Assurance Co. as the insurer of Macro and MOE.

Defendants Macro, Hirai, Yamagishi and American Home Assurance Co. now move for summary judgment against the plaintiff maintaining that, as a matter of law, the Exemption Agreement bars the plaintiff's claim for all damages against the defendants, including those proximately caused by any negligence on their part.

SUMMARY JUDGMENT STANDARD

A summary judgment will be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Com.R.Civ.Pro. Rule 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). To withstand a motion for summary judgment, the non-moving party must show that there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. 106 S.Ct. at 2511. The mere

existence of a scintilla of evidence in support of a plaintiff's position will be insufficient. There must be evidence on which a jury could reasonably find for the plaintiff. 106 S.Ct. at 2512. In determining whether a genuine issue of fact exists, the court can only consider evidence which would be admissible and have probative force at trial. *Colan v. Cutler-Hammer, Inc.,* 812 F.2d 357 (7th Cir. 1987).

DISCUSSION

At common law there was no cause of action for wrongful death; the right to bring such an action is strictly statutory. *Flowers v. Hyatt,* 1 CR 693 (C.T.C. 1983). The Commonwealth's wrongful death statute (7 CMC §§ 2101-2103) creates a cause of action for wrongful death in the Commonwealth. Pursuant to 7 CMC § 2101(a), the plaintiff, as personal representative of the decedent, is entitled to maintain this action and recover any damages to the extent that the decedent would have been entitled to maintain an action and recover damages for injuries had he not died.

Conceding the truth of the allegations of negligence contained in the plaintiff's complaint for purposes of this motion only, the defendants argue that the Exemption Agreement's language includes any acts of negligence by the defendants and thus operates as a bar to the plaintiff's cause of action.

In her opposition to the defendants' motion, the plaintiff first contends that the defendants misconstrue the waiver provisions of the Application of Scuba Diving and Invoice. She points out that under the section entitled "Invoice" which appears at the bottom of the Application for Scuba Diving and Invoice, there is another waiver provision that is

unsigned. This provision which is printed in English only, reads as follows:

> I, (sic) fully check the equipment and everything are (sic) confirmed. I, the undersigned not (sic) hold the Macro Energy, Inc. responsible nor liable any (sic) diving, fishing boating (sic) accidents. I will return the equipment. . . .

The plaintiff argues that the Exemption Agreement released the defendants from liability for inherent risks of diving generally, while the second, unsigned waiver specifically waives liability for defective equipment. Relying on the general rule of contracts holding that when a contract has two provisions, one general and one specific, the specific provision controls over the general provision, the plaintiff concludes that the second unsigned waiver provision operates to limit the scope of the Exemption Agreement, thus denying the defendants insulation from liability for negligent issuance of defective scuba diving equipment. This argument is without merit.

Assuming arguendo that the Application for Scuba Diving and Invoice is a "contract" between Ito and Macro,[4] since Ito never signed the second waiver provision, it never became part of the "contract." As such, the plaintiff's cited contract rule is inapplicable.[5]

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[4]The court makes no finding on this issue.

[5]The court notes that the Application for Scuba Diving and Invoice is distinctly divided into two parts, the first being the scuba application and the second being the invoice. At the hearing on the motion, defendants' counsel explained that the waiver provision in the invoice section would only be signed if the customer were renting equipment and diving on his own rather than as a member of a dive supervised by Macro, in which case the Exemption Agreement would be signed by the customer, as Ito did.

The plaintiff next attacks the Exemption Agreement itself, claiming that unless an agreement clearly and unequivocally provides for the release of another's negligence, that obligation will not be inferred. *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So.2d 487 (Fla. 1979). Citing *Madison v. Superior Court*, 250 Cal.Rptr. 299 (1988), the plaintiff maintains that the Exemption Agreement must specifically refer to the defendants' negligence in order to include such negligence within its waiver terms. The plaintiff has cited other cases which she claims support the above rule of law. *See, O'Connel v. Walt Disney World Co.*, 413 So.2d 444 (Fla. 1982); *Sivaslian v. Rawlins*, 451 N.Y.S.2d 307 (1987). The defendants, on the other hand, have cited cases wherein it was held that a release did not have to specifically waive liability for negligence in order to bar claims based on negligence. *See, Heil Valley Ranch, Inc. v. Sumkin*, 784 P.2d 781 (Colo. 1989); *Hewitt v. Miller*, 621 P.2d 244 (Wash. Ct.App. 1974); *Trainer v. Azatlan Cycle Club, Inc.*, 442 N.W.2d 626 (Wis. 1988).

While none of the above cited cases are controlling in the Commonwealth, they are instructive and, at the very least, indicate a split of authority on the issue of whether a release must specifically refer to negligent conduct in order to act as a bar to claims based upon negligence. At the very most, all of the cases are in agreement that a waiver of liability must be clear and unambiguous. In any event, Section 496 of the

Restatement (Second) of Torts (1965) is dispositive and controlling on this issue.[6] Section 496 B provides:

> A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

By signing the Exemption Agreement, Ito acknowledged that "*all* the risks" that he would be exposed to on the dive were his alone. Moreover, Ito expressly agreed to forego all claims for damages in the event of a diving accident causing his injury or death. Clearly, the unambiguously expressed intent of the parties to the Exemption Agreement was to extinguish liability. In signing the Exemption Agreement, Ito also acknowledged that he had read and fully understood its terms. Moreover, Ito understood that equipment failure was an obvious risk of scuba diving inasmuch as his training included what to do in "out-of-air" situations. Under these circumstances, it is reasonable to conclude, as a matter of law, that Ito expressly agreed to accept a risk of harm arising from the defendants' negligent conduct. Indeed, it is difficult to imagine any claim that Ito, or in this case, the plaintiff, could have brought that would not have been based on negligence. To construe the Exemption Agreement in any other manner would render it essentially meaningless.

The plaintiff begins her next argument by erroneously asserting that the defendants' motion rests on Hirai's belief

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[6]In all proceedings, the rules of the common law, as expressed in the restatement of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth. See 7 CMC § 3401.

that Ito died of a ruptured lung caused by holding his breath while surfacing, a violation of the basic diving rule. Proceeding on the false premise that the Exemption Agreement operates to relieve the defendants of liability only if Ito violated a diving rule, the plaintiff asserts that Hirai is unqualified to assert a medical opinion of Ito's death. The plaintiff then concludes that the defendants have failed to show that Ito violated a diving rule, thus precluding the Exemption Agreement from serving as a basis for summary judgment.

While the defendants' statement of facts did include Hirai's hypothesis as to the cause of Ito's death, the defendants also stated that for purposes of their motion, it made no difference how Ito died (Defendants' Memo. at p. 12). The defendants further state that their motion rests upon Ito's knowing, voluntary and express waiver of his right to sue for damages in the event of his injury. Since the court's interpretation of the Exemption Agreement necessarily compels its rejection of the plaintiff's interpretation of the Exemption Agreement that is a premise of plaintiff's argument now under discussion, there is no need to consider the argument further.

Finally, the plaintiff argues that even if the Exemption Agreement applies to the defendants' negligent acts, it does not release them from those acts constituting willful and wanton misconduct. Willful or wanton misconduct falls between simple negligence and an intentional tort and is sufficient where an actor knows, or has reason to know, of circumstances which would bring home to the realization of the ordinary reasonable person the highly dangerous character of his conduct. *Liberty Furniture v. Sonitrol of Spokane,* 770 P.2d 1086 (Wash. Ct.App. 1989).

Because a determination of whether conduct in a particular case constitutes willful and wanton misconduct is greatly dependent upon the particular facts of each case, it is

generally within the peculiar province of the jury to consider whether the actor's conduct can be so designated. 57A Am.Jur.2d, *Negligence,* § 307. Where, however, there is insufficient evidence regarding an element of the pertinent type of conduct, the issue should not be submitted to the jury. *Id.*

The plaintiff relies, to a large extent, on the statement of Robert Campbell, who tested Ito's equipment after the accident (see, Campbell Statement attached to Hirai's dep.) and Hirai's deposition testimony to raise the issue of the defendants' willful and wanton misconduct. Since Campbell's statement is not in affidavit form as required by Rule 56, its contents will not be considered by the court. *Colan v. Cutler-Hammer, Inc.,* 812 F.2d 357 (7th Cir. 1987). Moreover, even if the Campbell statement were admissible and considered with plaintiff's cited Hirai deposition testimony in the light most favorable to the plaintiff, this evidence would be, as a matter of law, far short of that which would require its submission to a jury on the issue of willful and wanton misconduct.

In summary, the court concludes as matter of law that under any fact scenario plaintiff advocates as a basis for her wrongful death action against the movants, the Exemption Agreement signed by Ito bars recovery.

Dated at Saipan, MP, this 17th day of December, 1990.

Robert A. Hefner, Presiding Judge

APPENDIX D

APPENDIX D

Filed January 28, 1991
Clerk, Superior Court

CIVIL ACTION NO. 89-918

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

VS.

MACRO ENERGY, INC., MARIANAS OCEAN
ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI,
and AMERICAN HOME INSURANCE CO.,
Defendants.

AMENDED SUMMARY JUDGMENT

Upon the motion of the plaintiff to amend the summary judgment entered December 17, 1990 and for the reasons stated in the Memorandum Decision entered this date:

The summary judgment is amended to read:

IT IS ADJUDGED the plaintiff take nothing by the complaint against Macro Energy, Inc. and Marianas Ocean Enterprises. Those defendants are entitled to court costs.

Dated at Saipan, MP, this 28 day of January, 1991.

Robert A. Hefner, Presiding Judge

APPENDIX E

APPENDIX E

CIVIL ACTION NO. 89-918

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO.,
Defendants.

MEMORANDUM DECISION

This matter is before the court on the plaintiff's self styled Motion for Reconsideration of the court's order granting summary judgment to the defendants entered December 17, 1990.

Before addressing the merits of the plaintiff's motion, the court first considers the procedural posture of the motion. At the hearing on the motion there arose the question of whether plaintiff's motion had been timely brought by the plaintiff under the applicable rules of civil procedure. While not captioned as such, the court considers the motion as being brought in the posture of a Com.R.Civ.Proc. 59(e) motion to alter or amend judgment. *Clipper Express v.*

Rocky Mountain Motor Tariff, 674 F.2d 1252, 1260-61 (9th Cir. 1982). Rule 59(e) provides:

> [a] motion to alter or amend judgment shall be *served* not later than 10 days after entry of the judgment. [Emphasis added]

The clear language of the rule establishes that a Rule 59 motion is timely if served, but not filed, within the 10 day period. See, 11 Wright & Miller, *Federal Practice and Procedure,* § 2812 and n.47 (1973).[1] Although there is no filing requirement in Rule 59, Com.R.Civ.Proc. 5(d) requires that all papers to be served after the complaint "shall be filed with the court either before service or within a reasonable time thereafter." This reasonable time requirement has been fixed by Com.R.Prac. 6(f) which provides that "the original of all papers required to be served shall, unless otherwise submitted to the court, be filed in the office of the clerk within three (3) days after service has been completed."

In the instant case, the court granted summary judgment on December 17, 1990. Plaintiff served her notice of motion and motion on the defendants on December 27, 1990. The notice of motion and motion was filed on December 28, 1990. The plaintiff's memorandum of points and authorities in support of the motion was served on December 27, 1990 and filed on December 28, 1990. Notwithstanding the apparent timely service and filing of the motion and supporting documents, the defendants point out several mechanical deficiencies in the motion. While the court recognizes the importance of adhering to the technical requirements of the rules of practice and civil procedure, the interests of justice

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[1]Although the material in Wright & Miller and the case cited therein discuss the time for filing a Rule 59(b) motion which contains the same ten day service requirement as Rule 59(e), the underlying rational is equally applicable to Rule 59(e) motions.

require it in this instance to waive any technical deficiencies and reach the merits of the motion. Taken together, the notice of motion and motion, and the memorandum of points and authorities sufficiently apprised the defendants of the nature and grounds of the motion and the court cannot discern any unfair prejudice that would result to the defendants in reaching the motion's merits.

Therefore, the plaintiff's motion is considered timely served and filed and properly before the court.

Turning to the merits of the motion, the plaintiff's main contention is that the court failed to follow the mandate of Restatement (Second) of Torts, § 496(B) (1965) which requires an express agreement to waive liability.[2] This argument is without merit. The language of the Exemption Agreement clearly and unambiguously manifests an express agreement by Ito to waive all claims for damages in case of an accident causing his injury or death. (See Memorandum Decision at pp. 10-11) The plaintiff has not shown the court why it should now alter or amend its decision on this issue.

The defendants have raised the issue of whether MOE was included in the grant of summary judgment. Since the complaint included MOE as a defendant based upon the theory that it was the alter ego of Macro, the grant of summary judgment does run in favor of MOE. However, upon further review of the Exemption Agreement, the court finds that its coverage does not extend to defendants Hirai

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[2]The plaintiff advanced several other arguments in support of her motion, however these arguments were either reiterations of earlier arguments or were being made for the first time on the motion. Such arguments are not proper subject matter for a Rule 59(e) motion. *Taylor v. Knapp,* 871 F.2d 803 (9th Cir. 1989) (Reiteration of earlier arguments provide no basis for reconsideration under Rule 59(e).) *Fay Corporation v. Bat Holdings I Inc.,* 651 F.Supp. 307 (D.C. Wash. 1987) ("afterthoughts" or "shifting of ground" are not appropriate basis for reconsideration), aff'd. 896 F.2d 1227 (9th Cir. 1990).

and Yamagishi individually. The court's grant of summary judgment as to Hirai and Yamagishi was therefore in error and the court's order of summary judgment is hereby amended accordingly. Since the issue of whether defendant American Home Insurance Company's policy of insurance with Macro extended to Hirai and Yamagishi individually was not an issue in the summary judgment proceedings, that portion of the order granting summary judgment in favor of American Home Insurance Company was in error and will be amended accordingly.

IT IS SO ORDERED.

Dated at Saipan, MP, this 28 day of January, 1990.

Robert A. Hefner, Presiding Judge

APPENDIX F

APPENDIX F

CIVIL ACTION NO. 89-918

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,
Plaintiff,

vs.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME ASSURANCE COMPANY,
Defendants.

JUDGMENT

This matter came before the Court for trial on May 26, 1992. Based on the matters adduced at trial good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiff shall have judgment over and against defendants for general damages in the amount of $2,434,857.55.

2. Plaintiff is entitled to costs as may be taxed by the Clerk of the Court.

SO ORDERED this 22nd day of June, 1992.

PEDRO M. ATALIG
Presiding Judge

APPENDIX G

APPENDIX G

APPEAL NO. 92-020 & 92-022 (Consolidated)
CIVIL ACTION NO. 89-918

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Plaintiff/Appellee/Cross-Appellant,

VS.

MACRO ENERGY, INC., MARIANAS OCEAN
ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI,
and AMERICAN HOME ASSURANCE COMPANY,
Defendants/Appellants/Cross-Appellees.

JUDGMENT

Pursuant to Rule 36 of the Rules of Appellate Procedure, the OPINION of the Supreme Court in this matter has been issued and judgment thereon is hereby given the parties, and a copy of the OPINION which AFFIRMED IN PART, REVERSED IN PART, AND REMANDED the judgment of the trial court is herewith served on all parties.

Dated at Saipan, MP, this 26th day of October, 1993.

CHARLES M. CALVO, JR.
Clerk of Court

By: _____
CRIS M. KAIPAT
Deputy Clerk of Court

APPENDIX H

APPENDIX H

APPEAL NO. 92-020 & 92-022 (Consolidated)
CIVIL ACTION NO. 89-918

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased,
Plaintiff/Appellee/Cross-Appellant,

vs.

MACRO ENERGY, INC., MARIANAS OCEAN
ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI,
and AMERICAN HOME ASSURANCE COMPANY,
Defendants/Appellants/Cross-Appellees.

OPINION

Argued and submitted March 15, 1993

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BEFORE: DELA CRUZ, Chief Justice;
VILLAGOMEZ, Associate Justice; and
CRUZ, Special Judge

DELA CRUZ, Chief Justice:

This consolidated appeal involves several issues arising from plaintiff's wrongful death suit as personal representa-

tive for the heirs of the decedent, Mr. Akinobu Ito. Ito drowned while on a scuba diving trip supervised by defendants. On the day of his death, Ito signed an "AGREEMENT FOR EXEMPTION FROM OBLIGATION."

The trial court ruled on a pre-trial motion that the release exonerated defendant Macro Energy, Inc. ("Macro") and Marianas Ocean Enterprises ("MOE"), but not defendants Yamagishi and Hirai. After a two-week trial, the trial court found that Yamagishi and Hirai's negligence was a proximate cause of Ito's death, and entered judgment for plaintiff. The threshold issue on this appeal is whether the release exonerates any of the defendants for their negligence. Plaintiff and defendants also raise several other issues on appeal, including one involving the coverage liability of defendant American Home Assurance Company.

We hold that the release does not exonerate any defendant because, as drafted, it does not comply with Restatement (Second) of Torts Section 496B, the applicable rule in the Commonwealth governing express assumption of risk. We therefore go on to address the other issues raised by the parties.

I. PROCEDURAL HISTORY.

This lawsuit was filed by Ryoko Ito ("plaintiff"), as personal representative of the heirs of her deceased husband, Akinobu Ito ("Ito").[1] Ito drowned on September 24, 1988, during a scuba diving accident at Saipan's "Grotto."

The other parties in this lawsuit are as follows:

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[1]The CNMI's wrongful death statute is found at 7 CMC Section 2101. Subsection (a) provides, in part:

> When the death of a person is by [a] wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, the person or corporation which would have been liable if

Macro Energy, Inc. ("Macro"), the Saipan-based scuba diving company that trained Ito to dive in June of 1988 and to which he returned on September 24, 1988.

Marianas Ocean Enterprises ("MOE") — alleged to be the "alter ego" of Macro.

Shigemi Yamagishi ("Yamagishi") — diving instructor and Macro's president.

Nobuo Hirai ("Hirai") — assistant instructor employed by Macro.

American Home Assurance Company ("American Home") — Macro and Yamagishi's insurer during all relevant dates.[2]

Plaintiff's complaint contained four causes of action relating to (1) negligent instruction by defendants in the June 1988 scuba diving course; (2) negligence of defendants on the day of Ito's death, September 24, 1988; (3) coverage under the American Home insurance policy[3] and (4) MOE's alter-ego relationship with Macro.

On November 7, 1990, Macro, American Home, Yamagishi, and Hirai moved for summary judgment under Section 496B of the Restatement of Torts (Second), based on the "AGREEMENT FOR EXEMPTION FROM OBLIGATION" (herein referred to as the "release agreement" or the "release") which Ito signed on the morning of his accident. The trial court granted the motion as to all four

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death had not ensued, . . . is liable to an action for damages notwithstanding the death of the person injured . . . .

[2]American Home Assurance Company was named as "American Home Insurance Company" in plaintiff's complaint. American Home Assurance Company appeared and litigated this action despite the defect. Accordingly, we have corrected its name in this caption.

[3]Plaintiff brings this suit against American Home pursuant to the Commonwealth's "direct action" statute. 4 CMC § 7502(e).

movants on December 17, 1990. On December 27, 1990, plaintiff moved for reconsideration of the order granting summary judgment.

On January 21, 1991, the trial court heard oral argument on plaintiff's motion for reconsideration, and, on January 28, 1991, entered an "Amended Summary Judgment" and "Memorandum Decision" which held that Yamagishi and Hirai were not released from liability.[4] The trial court also ruled that, although MOE was not a movant, "[s]ince the complaint included MOE as a defendant based upon the theory that it was the alter ego of Macro, the grant of summary judgment does run in favor of MOE." Memorandum Decision of January 28, 1991 at 4. Therefore, after January 28, 1990, plaintiff's case stood only against defendants American Home, Yamagishi and Hirai.

On April 16, 1991, after a hearing on a motion for summary judgment brought by American Home, the trial court ruled that American Home's liability coverage was limited to $100,000. It also ruled that plaintiff had waived her claim for loss of consortium. *See* Memorandum Opinion dated April 16, 1991.

Thereafter, in September 1991, American Home, Yamagishi and Hirai moved, pursuant to Rule 54(b), Commonwealth Rules Civil Procedure, for certification of (1) the trial court's January 28, 1991 judgment regarding the release and (2) the trial court's April 16, 1991 order regarding the policy limits and plaintiff's claim for loss of consortium. We dismissed these appeals because they were

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[4]The trial court's Amended Summary Judgment does not state why the trial court changed course. The court wrote: "upon further review of the Exemption Agreement, the court finds that its coverage does not extend to defendants Hirai and Yamagishi individually." Memorandum Decision of January 28, 1991 at 4. Defendants Yamagishi and Hirai contend on appeal that the trial court amended its order because they were not specifically mentioned in the release.

not final within the meaning of Rule 54(b). *See Ito v. Macro Energy, Inc.* Nos., 91-032, 91-033, 91-034 & 91-037 (Consolidated) (N.M.I. Feb. 3, 1992).

A two-week trial was held between May 26, 1992 and June 5, 1992, after which the trial court entered judgment in the amount of $2,434,857.55 against Hirai, Yamagishi and American Home. On August 10, 1992, after motion by American Home, the court issued an Amended Judgment limiting American Home's liability for damages to $100,000.

Yamagishi and Hirai timely filed a joint notice of appeal on August 14, 1992. Plaintiff also timely appealed on August 21, 1992. We consolidated the two appeals on September 22, 1992. Other procedural matters of this case are set forth where pertinent, below.

II. FACTS.

The following 73 points of fact are taken verbatim from the trial court's Findings of Fact and Conclusions of Law dated June 22, 1993 (hereafter, "Findings of Fact").[5]

1. In June of 1988, the decedent, Akinobu Ito ("Ito") with Yosuhiro Fujitomi ("Fujitomi") enrolled in a scuba diving course offered by MACRO Energy, Inc. ["Macro"] in Saipan.

2. Shige Yamagishi ("Yamagishi") is a shareholder and a director of [Macro].

3. Yamagishi is the diving instructor of [Macro].

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[5]Defendants do not directly challenge the trial court's factual findings except to argue that (1) the trial court applied a wrong standard of care in evaluating their dive course and supervision, and (2) the trial court's damage award was excessive and clearly erroneous. These issues are discussed below.

4. Ito enrolled in the scuba diving course so that he [could] obtain[ ] certification as an open water diver.

5. The course [Macro] offered Ito, require[d] minimal pre-dive instruction and training. There was no pool or confined water training. Written student testing consisted of requests for student/volunteers to answer questions orally whether the students answered the questions correctly or not the instructor revealed the answer to the students who filled in the answers on their book. Water instructions took place inside the Grotto.[6]

6. Upon the completion of Ito's scuba diving course, Yamagishi signed a certification card certifying Ito as an ADS open water diver. ADS is a Japanese scuba diving agency that issues a card certifying a diver as an open water diver.

7. Yamagishi signed a certification card certifying Ito as a CMAS one-star diver. CMAS is a French agency which is internationally recognized around the world and issues a card certifying a diver as a CMAS one-star diver.

8. Although Yamagishi signed the ADS and CMAS certification for Ito, he never personally instructed Ito in the class or in the water instruction in the Grotto.

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[6]The Grotto is a sometimes turbulent pool of water surrounded on three sides by a natural rock formation. It contains three underwater outlets through which a diver can swim into the Pacific Ocean. These outlets differ in length and width. The north entrance requires a diver to go 15 feet underwater and swim under an overhead rock formation for another 10 to 15 feet. This outlet is very simple to dive. It was revealed at trial that on a calm day, a strong swimmer can "free dive" under the rock formation and out to the ocean quickly without the assistance of an underwater breathing apparatus. This was not the hole used by the divers in this case. The hole that was used was the center hole. This hole is approximately 20 meters [65.6 feet] underwater and is approximately 120 feet in length.

9. Open water diver is a term recognized as being required in any certification course issued by various agencies. Various agencies around the world certify people as scuba divers under standards established for their respective agencies.

10. The course that Ito and Fujitomi attended to receive their open water diver certification did not meet the minimum standards.

11. CMAS has specific standards which describe the knowledge and skills required in order for a diver to be granted a CMAS one-star diver certificate.

12. CMAS has a diver training program which indicates the current standard of training necessary in order to reach the minimum level of proficiency required for the award of a CMAS one star diver certificate.

13. The course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS.

14. Yamagishi did not exercise reasonable care as a scuba instructor in certifying Ito as an open water diver and a CMAS one star diver.

15. The following is a partial list of the deficiencies of the course that Ito took before Yamagishi issued the two certification cards:

(a) Unqualified persons were employed as instructors.

(b) Students were not given text books.

(c) Ito was not given time to study for a theory test.

(d) Ito was not given a formal test that would require him to prove mastery of scuba diving theory.

(e) No accurate records exist of by whom or what Ito was taught.

(f) No accurate records exist to prove that Ito demonstrated his mastery of the required scuba diving skills to a qualified instructor.

(g) No record exists to prove that Ito was taught scuba diving theory by a qualified instructor.

(h) Ito was taught a major part of the course by Aline Bouhey who was not a qualified instructor at the time.

(i) The only records that do exist were fabricated by Shige Yamagishi after Akinobu Ito was dead.

(j) The confined water training was done at the Grotto which is not an appropriate place to learn the necessary skills.

(k) Open water dive training was virtually non-existent and provided no opportunity to practice skills during supervised ocean dives.

(l) Octopus breathing was not taught.

(m) The number of exposures to each skill was not enough to learn the skill.

(n) Ito was not taught rescue techniques.

16. Yamagishi deceived Ito into believing that he was receiving the legitimate CMAS one star course and a legitimate open water diver course.

17. Ito was not aware of all the risks of scuba diving as a legitimate CMAS one star diver and an open water diver would be because he had not been properly trained.

18. Failure to receive the proper training in the scuba diving course that Ito took in June, 1988 was a proximate cause of Ito's death in September 24, 1988.

19. In September, Ito returned to Saipan to go scuba diving.

20. On September 24, 1988, Ito paid for the services of a dive guide because he did not want to dive unsupervised.

21. Shige Yamagishi and Nobuo Hirai were aware that Akinobu Ito was a CMAS one star diver, and that he had had only one ocean dive outside of the inner pool of the Grotto.

22. Yamagishi and Hirai knew that the dive that they planned to take Ito, along with fourteen other people, on[ ] that day was a deep dive and that Ito had never dove deeper than 30 feet.

23. Yamagishi and Hirai knew that divers must be closely supervised on their first deep dive.

24. A dive of more than 100 feet is a deep dive.

25. Yamagishi and Hirai undertook to render the service of dive guide and dive supervisor of Akinobu Ito.

26. Yamagishi and Hirai failed to exercise reasonable care in the performance of supervising the dive.

27. Yamagishi was a shareholder and officer of the company that provided the scuba diving equipment and was responsible for its proper maintenance.

28. The regulator given to Ito leaked air which may have caused air to be used faster than normal.

29. The pressure gauge of the regulator given to Ito read 130 psi higher than was actually in the tank, so if the gauge read 400 psi, it actually only had 270 psi in the tank.

30. Yamagishi and Hirai failed prior to the dive to familiarize themselves with the divers under their charge and their respective abilities.

31. Yamagishi and Hirai failed to discuss with Ito the special circumstances of a dive to more than 100 feet,

including the more rapid exhaustion of air and nitrogen narcosis.

32. At the site of the Grotto, Yamagishi and Hirai failed to give an adequate dive briefing and failed to check Ito's equipment.

33. During the first half of the dive, Yamagishi was the only guide with fourteen divers.

34. Yamagishi led the dive to a depth of more than 100 feet far beyond the training capabilities of Ito.

35. Scuba divers are required to dive with a partner termed a buddy; Fujitomi and Ito were buddies.

36. Fujitomi developed a problem with his air source and was assisted by Hirai and the two rose to the surface.

37. At the time that Fujitomi rose to the surface, Ito followed the correct procedure that he had been taught and followed his buddy Fujitomi to the surface.

38. At the time Ito, Fujitomi and Hirai rose to the surface, Yamagishi was at the mouth of the central entrance to the Grotto, with all the other divers between them.

39. At the time that Fujitomi rose to the surface Hirai failed to signal Yamagishi to halt the dive and Yamagishi failed to wait to resolve the problem.

40. With two divers on what he claims is the dangerous surface, Yamagishi, without determining their problem, turned and led the other divers back through the Grotto entrance and at no time after that did Yamagishi ever search for them.

41. At the time that Ito rose to the surface Hirai did not instruct him to immediately descend and join the other divers.

42. At the time that Ito rose to the surface Hirai did not check Ito's remaining air supply.

43. Hirai directed Ito to follow him down and then chose the longest and deepest way to return to the surface inside the Grotto.

44. A much easier and safe alternative was available to Hirai by snorkeling on the surface with inflated BCD and then returning through the much more shallow and shorter northern entrance.

45. At the entrance to the tunnel to return to the inner Grotto, Hirai had 1500 psi of air, a very comfortable supply even for two people.

46. At the same point Ito had only between 400-500 psi, a questionable amount, particularly because at readings of less than 500 the pressure gauges are not as accurate as they are at higher readings.

47. Instead of swimming normally holding on to Fujitomi and Ito, Hirai turned upside down and pulled himself along the roof of the center tunnel of the Grotto, with Fujitomi clutching his tank and he using his hands to pull himself along the roof.

48. Hirai's goal seemed to be to arrive at the surface in the fastest time rather than in the safest way, yet there was no reason for his haste, since he had ample air.

49. Hirai's decision to pull himself along the roof prevented him from maintaining a clear view of Ito and keeping Ito close by holding onto Ito's vest.

50. At some point in the tunnel, Ito gave Hirai an out of air sign and Hirai gave him his octopus regulator.

51. Hirai did not hold Ito's vest while Ito was using his regulator in violation of the standard procedure that he had learned in his training.

52. Hirai continued his unreasonable crawl along the roof upside down, instead of swimming normally to the surface while holding onto Ito and Fujitomi.

53. After discovering that Ito was not together with him when he surfaced, Hirai dove and brought Ito to the surface.

54. The most important thing to do for a submersion incident victim is to get the victim out of the water as quickly as possible.

55. Hirai and Yamagishi did not take Ito directly out of the water but attempted for fifteen to twenty minutes to resuscitate him in the water.

56. At this time one of the members of the dive group, a Dr. Takagi, surfaced and observed that Hirai and Yamagishi were supporting Ito on the surface and giving mouth to mouth resuscitation to him; he noted the time as 10:46.

57. Takagi watched for three or four minutes and then went over to help, Yamagishi told him to take Ito's pulse, and he did noting that the pulse was 60 and beating normally. Yamagishi told Takagi to make sure in taking the pulse. Ito vomited water a number of times.

58. Thereafter at two to three minute intervals Takagi continued to take Ito's pulse and it continued to beat at rate of about 40/50 per minute.

59. Shortly after 11:00 the pulse rate became drastically weak and pinkish water started coming out of Ito's mouth.

60. At 11:03 the pulse became 0, and Yamagishi said to get him up, and other people then helped to get him up and out of the water, where heart massage was commenced and mouth to mouth resuscitation continued.

61. At about 11:10 the ambulance arrived and they carried Ito away and he was pronounced dead on arrival at the Commonwealth Health Center.

62. The appropriate treatment for either drowning or air embolism is oxygen. Yamagishi and Hirai did not have oxygen at the Grotto.

63. Akinobu Ito's cause of death was drowning.

64. Yamagishi and Hirai made statements to the police and other agencies immediately after the incident but did not mention seeing blood in the water.

65. Blood is a potential symptom of air embolism but is seldom seen.

66. Air embolisms occur because of a change in pressure upon ascent, and descent.

67. Pink froth is indicative of pulmonary edema which results from the inhalation of water or other foreign matter to the lung.

68. The blood found in Ito's stomach resulted from his stomach ulcer.

69. Hirai stated in a memorandum to the Japanese Consulate that at 11:05 Ito had a weak pulse.

70. At the time of his death Akinobu Ito was 46 years old, gainfully employed by a major Japanese company, earning more than $60,000 a year. He expected to work for that same company or one of its subsidiaries until he was seventy years old.

71. Akinobu Ito is survived by a loving wife Ryoko and two children, Chiyo and Masteru.

72. The income that Akinobu Ito could have been expected to provide to his wife and children over his working life reduced to present value at an exchange rate of Y126.78/$ is $2,389,857.55.

73. Funeral and burial expenses total $45,000.

III. ISSUES PRESENTED AND STANDARDS OF REVIEW.

1. The threshold issue on this appeal is whether Ito expressly assumed the risk of harm arising from defendants' negligence by signing the release, and, if so, which defendants are exonerated by operation of the release. The trial court interpreted the release is exonerating defendants Macro Energy and MOE and entered summary judgment in their favor. We review *de novo* the effect of the release on the question of liability. *Rios v. MPLC*, NO. 92-019 (N.M.I. Feb. 19, 1993).[7]

2. Whether Ito impliedly assumed the risks which led to the accident.

3. Whether Ito was contributorily negligent.

4. Whether the trial court applied an incorrect standard with respect to defendants' duty of care.

Issues no. 2 and 4 involve mixed questions of law and fact and therefore are reviewed *de novo. Id.*

5. Whether the trial court erred in failing to consider defendant Hirai's motion for summary judgment to enforce a settlement agreement on the date set for trial. A trial court's failure to rule on a motion is a denial thereof by operation of law and, in this case, implicates the trial court's power to control its docket. We therefore review its ruling for abuse of discretion. *Atchinson, Topeka & Santa Fe Ry. Co. v. Parr*, 391 P.2d 575 (Ariz. 1964); *Edwards v. Cass County, Tex.*, 919 F.2d 273 (5th Cir. 1990).

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[7]In the trial court, plaintiff and MOE briefed the issue of whether MOE is the "alter-ego" of Macro. However, "the issue was not resolved in the trial court. [Footnote omitted.] Instead, summary judgment proceedings commenced on the issue of the express release agreement." *See* Brief of appellee MOE at x. We do not decide the alter-ego issue because it has not been raised on this appeal.

6. Whether the trial court erred in ruling that plaintiff had waived her loss of consortium claim. The trial court found that plaintiff's counsel "admitted" that plaintiff had no claim for consortium on summary judgment. Such ruling is a conclusion of law and is reviewable *de novo. Rios v. MPLC*, No. 92-019 (N.M.I. Feb. 19. 1993).

7. Whether the trial court erred in its calculation of damages, and in not revealing its calculations in determining damages. Damage awards are reviewed under a "clearly erroneous standard." *Reyes v. Ebetuer*, No. 90-017 (N.M.I. Jan. 29, 1992).

8. Whether the trial court erred in ruling that American Home's coverage under the policy is limited to $100,000. The trial court's interpretation of language in an insurance policy involves a question of law which is subject to *de novo* review. *Tokio Marine & Fire Ins. Co., Ltd. v. Marianas Ocean Enterprises, Inc.*, 3 CR 748, 753 (D.C.N.M.I. App. Div. 1989).

IV. ANALYSIS.

1. Ito's Express Assumption of the Risk.

The release which Ito signed before the diving accident and which is critical to this litigation states as follows:

MACRO ENERGY, INC.

APPLICATION FOR PARTICIPATING IN SCUBA DIVING & INVOICES

* * *

(AGREEMENT FOR EXEMPTION FROM OBLIGATION)

I SUBMITTED AN APPLICATION FOR PARTICIPATING IN THE DIVING TOUR AND OR TRAIN-

ING PROGRAM TO BE CONDUCTED BY YOUR AGENCY. I FULLY ACCEPT AND UNDERSTAND THAT SUCH A DIVING TOUR AND TRAINING INVOLVES BASIC RISK AND DANGER. IF WE FAIL TO ABIDE BY THE RULES AND REGULATION SET BY THE GUIDES AND INSTRUCTORS AND IF WE NEGLECT THE DIVING RULES, WE REALIZE THAT WE MAY RISK OUR LIVES. ALL THE RISKS THAT WE MAY HAVE DURING THE PERIOD OF STAY HERE BELONG TO EACH OF US PERSONALLY. IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SHALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES. WE HEREBY SWEAR TO ABIDE BY AND ACT AT THE RULES AND INSTRUCTIONS SET BY THE GUIDES AND INSTRUCTORS. ALSO I AM FULLY A GROWN UP AT LAW AND I ACKNOWLEDGE THE FACT THAT I AM FULLY QUALIFIED TO SIGN THIS AGREEMENT, TO VERIFY THE EXEMPTIONS FROM ALL THE CLAIMS FOR DAMAGES. ALL THE ITEMS IN THIS APPLICATION ARE TO BE DECIDED BY THE AGREEMENT, AND I PERSONALLY SIGN THIS DOCUMENT AT MY OWN WILL RATHER THAN SOMEONE DIRECTING ME TO SIGN THIS PAPER.

The release also contains the above paragraph in Japanese.[8] The release was signed by Ito and dated "9/24/88."

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[8]The decedent apparently was proficient only in Japanese, and read the Japanese language version of the release before signing it. At oral argument, counsel for plaintiff stated that only the English language version of the release has been the subject of dispute in this lawsuit. Defendants do not contend otherwise, nor do they assert that the Japanese version of the release contains language which in legal effect

The trial court initially ruled that the release exonerated all defendants, but subsequently amended its summary judgment and ruled that the release did not exonerate defendants Yamagishi, the president of Macro Energy, and Hirai, an employee of Macro Energy.

In the Commonwealth, the rules of the common law as expressed in the Restatements of the law as approved by the American Law Institute serve as the applicable rules of decision, in the absence of written or local customary law to the contrary. 7 CMC § 3401. Because we have no statute or local customary law regarding express releases, Restatement (Second) of Torts Section 496B (hereafter referred to as "Section 496B") is applicable. That section provides:

> A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

There is no dispute that the release is either a "contract" or a document by which Ito may have "otherwise expressly agree[d]" to assume certain risks. There also is no dispute that Ito read and executed the release. The issue on appeal concerns the language of the release instrument, and whether that language, as a matter of law, exonerates defendants from their negligence. We conclude that it does not.

A. The Requirements of Section 496B.

In order for a release to be valid and binding, it must comply with the requirements of Section 496B. In determining whether the release meets the requirements of Section 496B, we shall strictly construe the language of the

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differs from the English version. Therefore, our decision is based solely on the English language version.

release, *Schutkowski v. Carey*, 725 P.2d 1057, 1060 (Wyo. 1986), especially where, as in this case, it is drafted by defendants and purports to exonerate them. *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989); *see also*, Section 496B cmt. d.

By signing the release, Ito must have "*expressly* agree[d] to accept a risk of harm *arising from the defendant[s'] negligent or reckless conduct.*" (Emphasis supplied.) We turn to the language of the release to determine what risks Ito "expressly" agreed to assume.

In doing so, we find no mention of Ito accepting a risk of harm arising from the "defendant[s'] negligent conduct." The release contains no language that the risk of harm which Ito agreed to assume was that harm which may arise due to defendants' negligence. Although the release states that "ALL THE RISKS THAT WE MAY HAVE DURING THE PERIOD OF STAY HERE BELONG TO EACH OF US PERSONALLY" and that Ito (or his heirs) will not file suit "IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF," it fails to mention that the risks encompass defendants' negligence.

The language of the release does not "expressly" warn or alert Ito that the risk of harm he was assuming is one that may arise from defendants' negligence. Absent clear language in the release itself, we are not persuaded, as a matter of law, that the release meets the requirements of Section 496B: that Ito "expressly agree[d] to accept a risk of harm arising from the defendant[s'] negligent or reckless conduct."

"[A]lthough uniformly agreeing that exculpatory agreements must be strictly construed against the drafter, [courts] are split on whether 'negligence' must be specifically mentioned [in a release], or whether more inclusive and general terms may be employed." *Heil Valley Ranch,*

Inc, 784 P.2d at 784 (footnote omitted). This split in authority regarding such a requirement appears to be based on the various jurisdictions' public policy views pertaining to these types of releases, and how each views the importance of the language of the release itself, i.e. whether the language is sufficiently clear so that the one signing it knows what is being given up. In the absence of legislation, the common law is developed, based on the application of general notions of justice and fair play, taking into account the circumstances and experiences unique to a particular jurisdiction.

Our jurisdiction is not vested with a similar degree of freedom in formulating our own common law as that exercised by courts in other jurisdictions, because of the statutory dictate that we apply the Restatement. 7 CMC § 3401. Thus, we must acknowledge the doctrine of express assumption of risk as set forth in Section 496B, which is part of our "rules of decision" in the Commonwealth. *Id.*

In interpreting Section 496B, however, we shall side with those jurisdictions which take the more cautious approach with respect to express assumption of risk. In doing so, we interpret Section 496B as requiring that a release must expressly mention that the risks of harm being assumed by a releasor include those arising from a releasee's negligence or reckless conduct. Certain notable jurisdictions have taken this approach to releases. *See Saenz v. Whitewater Voyages, Inc.*, 276 Cal.Rptr. 672 (Ct.App. 1990); *Madison v. Superior Court*, 250 Cal.Rptr. 299 (Ct.App. 1988); *O'Connell v. Walt Disney World Co*, 413 So.2d 444 (Fla.App. 1982); *Govings v. Jack and Ruth Eckerd Foundation*, 403 So.2d 1144 (Fla.App. 1981).

In *Madison v. Superior Court*, 250 Cal.Rptr. 299 (Ct. App. 1988), *review denied*, the court held that the release barred plaintiff's wrongful death action, which was premised on defendants' negligence during a scuba-diving course. The

release at issue in *Madison*, however, clearly stated that the releasor agreed not to sue if he suffered injury caused "by the negligence of" the releasees, and that the releasor agreed to "exempt and relieve [releasees] from liability for personal injury, property damage or wrongful death caused by negligence." *Id.* at 302 (quote in lower case). In upholding the release, the court wrote that "[a]s long as the release constitutes a clear and unequivocal waiver *with specific reference to a defendant's negligence*, it will be sufficient." *Id.* at 304 (emphasis supplied).

Florida agrees with the California analysis. In *Goyings v. Jack and Ruth Eckerd Foundation*, 403 So.2d 1144, for example, the court wrote, "an exculpatory clause, while not favored, may operate to absolve a defendant from liability arising out of his own negligent acts. For such a clause to be effective, however it must clearly state that it releases the party from liability for his own negligence." *Id.* at 1146.

Under the language of the release signed by Ito, we are not satisfied that, in signing the release, he "expressly agree[d]" to accept the risks, arising from defendants' negligence or reckless conduct, which caused his death. The release fails to set forth any express language as to defendants' negligence.

B. Applying a Less-Restrictive Standard under § 496B.

Some state jurisdictions have held that a release need not contain specific reference that the releasor is to assume the risk of harm arising from the releasee's negligent or reckless conduct. *Heil Valley Ranch, Inc.*, 784 P.2d at 784; *Blide v. Rainier Mountaineering, Inc.*, 636 P.2d 492, 493 (Wash. App. 1981), *review denied*, 96 Wash.2d 1027 (1982); *Schutkowski*, 725 P.2d at 1061. Where that is the case, however, the release must be "clear that the parties' intent was to release [defendants] from liability for negligence." *Schutkowski*, 725 P.2d at 1061.

If we were to disregard a strict interpretation of the requirements of Section 496B and apply *Schutkowski's* less-restrictive standard to the release signed by Ito, the release would still not meet that standard because the only risk of harm which the release covers are those arising from *Ito's conduct*, not the risk of harm arising from defendants' negligence. The release alerted Ito that he could be injured if *he* failed "TO ABIDE BY THE RULES AND REGULATION SET BY THE GUIDES AND INSTRUCTORS," or if he were to "NEGLECT THE DIVING RULES."[9]

We fail to see how these warnings regarding injury arising from *Ito's* failure to follow diving rules and regulations could be satisfactorily construed to mean that he intended "to release [defendants] from liability for [their] negligence." *Schutkowski*, 725 P.2d at 1061. The release as drafted and signed by Ito simply was not "clear" regarding the parties' intent. Thus, even if we read the release broadly, we still have difficulty construing the language of the release as containing an intent to absolve the releasees from *their* negligence.

C. The Effect of Comment d.

Yamagishi and Hirai contend that Comment d to Section 496B supports a ruling that the release exonerates them from liability. However, we are not convinced that if we apply the test implicit in Comment d, we would reach a different result.

Comment d provides that a "general clause[ ] . . . will *not be construed* to include loss or damage resulting from [a defendant's] intentional, negligent, or reckless misconduct

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[9]The trial court found that it was *defendants* who did not abide by the rules of proper training, supervision and rescue. *See*, Findings of Fact Nos. 13-18.

unless the circumstances clearly indicate that such was the plaintiff's understanding and intention." (Emphasis supplied.) Thus, where a general clause is used in the release, as in this case, the rule is that courts may not construe it to release a defendant from liability unless "the circumstances clearly indicate that such was the plaintiff's understanding and intention."

Here, again, the general clause releases the defendants from liability if Ito's death was caused by Ito's (1) failure to abide by the rules and regulations set by the guides and instructors, and (2) neglect of diving rules.

The general clause of the release reads:

> IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SHALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES.

This clause, when read together with the preceding sentences, does not "clearly indicate" that Ito understood or intended to release defendants from their negligence. For the reasons stated, even under Comment d, we do not read the release's "general clause" as exempting the negligent defendants from liability.

D. The Release Fails to Exonerate the Defendants.

The release at issue in this case does not meet the requirements of Restatement (Second) Torts Section 496B. We hold that a release, in order to be valid, at the very least must expressly mention that the releasor is assuming the risk of harm that may arise from the releasee's negligence or reckless conduct. Because the release which Ito signed did not comply with this requirement, we conclude as a matter of law that Ito did not "expressly agree[ ] to accept a risk of

harm arising from the defendant[s'] negligent or reckless conduct." Section 496B. The trial court thus erred in ruling that the release exonerated defendants Macro Energy, Inc. (the named releasee) and its alleged alter-ego MOE. Both Macro and MOE, as well as their agents/employees Yamagishi and Hirai, are not exempted from liability by operation of the release.

Plaintiff asserted liability against Macro on the theory of *respondeat superior*. Ito's Supplemental Brief at 3. Macro is liable for the negligence of its employees and/or agents, Hirai and Yamagishi, unless they were "acting outside the scope of their employment" during the course of events that caused Ito's death. Restatement (Second) of Agency § 219.

Plaintiff's complaint alleged that Hirai was employed by and Yamagishi was "an officer, director and/or employee" of Macro at the time the incident took place. Complaint ¶¶ 6 and 7. Macro, Hirai and Yamagishi filed a joint Answer and did not deny these allegations. Moreover, their joint Answer did not set forth an affirmative defense that Hirai and Yamagishi "acted outside the scope of their employment." And, Macro's briefs on appeal do not assert such a defense, only the same defenses of Hirai and Yamagishi which were resolved against them by the trial court and, as set forth below, by this court. Thus, we hold, as a matter of law, that Macro is subject to joint and several liability on the judgment.

We shall therefore remand the matter to the trial court for the limited purposes of (1) entering judgment against Macro, Yamagishi and Hirai, jointly and severally, in the amount of $2,434,857.55 and (2) determining whether MOE should also be held jointly and severally liable to plaintiff for the same monetary judgment, based on the theory that MOE is the "alter ego" of Macro.

2. Ito's Implied Assumption of Risk.

Defendants alternatively argue that if the release is not valid, Ito impliedly assumed the risk of harm arising from defendants' conduct. They contend that the risk of drowning is so inherent in the sport of scuba diving, that Ito must have impliedly assumed that risk by participating in the diving excursion with defendants.

The doctrine of implied assumption of risk, as contained in Restatement (Second) of Torts Section 496C (hereafter, "Section 496C"), states, in pertinent part:

> (1) Except as stated in Subsection (2), a plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . and who nevertheless voluntarily chooses to enter or remain, . . . under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk. (2) The rule stated in Subsection (1) does not apply in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.

Plaintiff argues that Section 496C(1) is inapplicable because the release is "invalid as contrary to public policy" under Section 496C(2). In support, she points to the trial court's finding that "Yamagishi deceived Ito into believing that he was receiving the legitimate CMAS one star course and a legitimate open water diver course." Finding of Fact No. 16. We have already ruled that the release failed because it did not comply with the express requirements of Section 496B, not because accepting such risk would be contrary to public policy. We shall therefore address the issue of whether Ito impliedly assumed the risk of harm arising from defendants' conduct.

Under Section 496C(1), Ito's implied assumption of the risk must have been *voluntarily* made, with his full understanding of the risk of harm resulting from defendants'

conduct. There is no dispute that Ito voluntarily chose to go diving. The issue, however, is whether Ito had knowledge of, and understood the risk of harm caused by defendants' conduct. Restatement (Second) of Torts Section 496D ("Section 496D") provides guidance in determining what level of knowledge a person must possess in order to impliedly assume the risk of harm arising from defendants' conduct. *See*, Restatement (Second) of Torts § 496C cmt. a. Section 496D states:

> Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.[10]

Defendants argue that Ito knew he could drown in water if he were to go scuba diving. *See* Section 496D cmt. d. That is true. However, the "risk of harm" which we must examine is that "arising from the defendant[s'] conduct." Section 496D. We need not examine any and all risks which could occur on a dive, such as drowning, a shark bite, or jellyfish sting.

Under Section 496D, Ito must have known of the existence of the risk and appreciated its unreasonable character to have impliedly assumed the risk. This means Ito "must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable." Section 496D cmt. b. Whether Ito was aware of and appreciated the dangers are questions of fact. *See* Section 496D cmt. e.

After a two week trial, the court found as a matter of fact that "Ito was not aware of all the risks of scuba diving . . . because he had not been properly trained." It also found

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[10]Again we note that, because the release used by defendants was invalid, Ito did not "expressly agree" to assume the risk of harm arising from the defendant's conduct.

that Ito's poor training "was a proximate cause of [his] death." (*See* Finding of Facts Nos. 17 and 18).

Although the trial court found that Ito "was not aware of all the risks of scuba diving," we cannot say with certainty whether he was likewise not aware of the specific risks which could arise from defendants' conduct. Nothing in the facts of this case indicates that Ito had any warning that defendants may be negligent in performing their duties.

There are no facts to indicate that Ito knew of the existence of the risk arising from defendants' conduct or that he "appreciate[d] its unreasonable character." Section 496D. Therefore, we hold that Ito did not impliedly assume the risk arising from defendants' conduct because he did not "fully" understand the "risk of harm to himself . . . caused by the defendant[s'] conduct" as required under Section 496C.

3. Ito's Contributory Negligence.

Defendants also argue that Ito was contributorily negligent as a matter of law because he failed to take reasonable precautions before encountering the risks of diving. According to Hirai, Ito failed to ask how long the dive would take and to find out what he should do if he and his dive buddy became separated. Defendants Macro and Yamagishi allege that Ito's death was caused by his violation of basic scuba diving rules and that Ito had the "last clear chance" to prevent his own death.

Contributory negligence is defined in Section 463 of the Restatement (Second) of Torts ("Section 463") as follows:

> Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negli-

gence of the defendant in bringing about the plaintiff's harm.

To conclude that Ito was contributorily negligent under Section 463, we conduct a two-step test. First, we must find that Ito did not observe the proper standard of conduct for his own safety. According to Restatement (Second) of Torts Section 464(1), the standard of conduct "to which [Ito] must conform for his own protection is that of a reasonable man under like circumstances."

Only if we find that Ito's conduct did not meet this 'reasonable man' standard may we move on to the second part of the test which is whether Ito's conduct legally contributed to his death. In conducting this analysis, we may find that Ito's own negligence "is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it." Restatement (Second) of Torts § 465(1).

We do not reach the second part of the test, however, because the facts show that Ito's conduct conformed to that of "a reasonable [person] under like circumstances." Section 464(1). Ito took defendants' diving course. The trial court did not find from the evidence that Ito was negligent in the manner he conducted himself.

Defendants' assertion that Ito was negligent in failing to ask questions about the dive's depth, duration, course, and emergency procedures does not have merit. *See* Hirai's Opening Brief at 41. Defendants had the duty to provide this information to Ito and the other divers, not the other way around: "Yamagishi and Hirai failed to discuss with Ito the special circumstances of a dive to more than 100 feet, including the more rapid exhaustion of air and nitrogen narcosis." Also, "[a]t the site of the Grotto, Yamagishi and Hirai failed to give an adequate dive briefing and failed to

check Ito's equipment." *See* Findings of Fact Nos. 31 and 32.[11]

Defendants held themselves out to be professional dive instructors and supervisors. Ito reasonably relied on their representation of professionalism when he registered to learn how to dive from defendants, and subsequently when he decided to dive at the Grotto under defendants' professional supervision. Ito paid for defendants' expert services. He had a right to expect that defendants would provide him with all important pre-dive information and conduct any last minute equipment checks that would be necessary. Defendants failed to do so.

It was the defendants who failed in their duty to Ito. Ito acted as a reasonable person would have under the circumstances. We, therefore, hold that Ito was not contributorily negligent under Section 463.

4. The Standard of Care for Diving.

Defendants argue that the trial court applied an incorrect standard of care in evaluating their conduct. They argue that the trial court erred because it measured their conduct "against a foreign standard of care rather than the prevailing standard of care in the Commonwealth." *See* Hirai's Opening Brief at 32; Yamagishi's Opening Brief at 34 (quote in lower case).

The trial court heard testimony by plaintiff and defendants' dive experts, and subsequently found that Macro's diving course "did not meet the minimum standards" and "did not meet the standards or follow the training program required by CMAS." Findings of Fact Nos. 10 and 13. The trial court, therefore, applied a standard premised upon the

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[11]The trial court also found that "Yamagishi led the dive to a depth of more than 100 [feet] far beyond the training capabilities of Ito." Findings of Fact No. 34.

CMAS requirements for dive certification. Defendants contend, however, that their conduct should be "adjudged according to the ADS[12] standard adhered to by scuba diving shops throughout the community of Saipan." *See* Yamagishi's Reply Brief at 20 (quote in lower case).

We reject defendants' contention for three reasons. First, defendants purported to certify Ito under the ADS *and* CMAS standards. The trial court found that defendant Yamagishi had "signed a certification card certifying Ito as an ADS open water diver" and "signed a certification card certifying Ito as a CMAS one-star diver."[13] Findings of Fact Nos. 6 and 7.

Defendants may not now contend that, although they purported to certify Ito under the CMAS standard, the trial court should have adjudged Macro's training course under a different "Saipan-only" standard. Defendants may not purport to offer one standard of dive instruction to its students, and subsequently argue that the trial court erred by not applying an apparently lower level standard in evaluating their dive course. The trial court correctly applied the standard which defendants themselves purported to offer Ito: CMAS.

Second, there apparently is *no* ADS "standard" for dive courses or other diving requirements. Defendants' own dive expert testified that he is "not familiar with any [ADS standard] and that ADS "refer[s] to the CMAS stan-

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[12]ADS is a Japanese dive organization and is a member of CMAS, an internationally recognized French dive agency. Reporter's Transcript ("R.T.") Vol. III, pp. 225-226.

[13]In fact, "[t]he course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS." Findings of Fact No. 13.

dard."[14] In light of this, we cannot say that the trial court erred in applying the CMAS standard.

Lastly, we disagree with defendants' contention that there is, or should be, a unique standard for Saipan dive shops and professionals. Defendants argue that — although there is no ADS standard — there exists an "ADS standard adhered to by scuba diving shops throughout the community of Saipan." Yamagishi's Reply Brief at 20 (quote in lower case). Defendants, however, fail to state what sort of diving requirements and skills do or should comprise such a Saipan-only standard, even though their expert arguably "was and is intimately familiar with the standards of the scuba diving industry in the Commonwealth and throughout Micronesia." Hirai's Opening Brief at 39.

Defendants rely on Restatement (Second) of Torts Section 299A ("Section 299A"), which provides

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

For some professions, an "[a]llowance must be made . . . for the type of community in which the actor carries on his practice." Section 299A cmt. g. For example, "[a] country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city." *Id.* However, this flexibility is not available to all professions. Comment g continues:

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[14]*See* R.T. Vol. XIII, pp. 1006-1007, quoted in Plaintiff's response Brief at 31-32. Yamagishi, on the other hand, states that the alleged ADS standard is "based in part on the CMAS standard" as "established and adhered to by the dive shops throughout Saipan." Yamagishi's Reply Brief at 22-23.

> In other professions, such as that of the attorney, such variations either do not exist or are not as significant, and allowance for them has seldom been made. A particular profession may be so uniform, in different localities, as to the skill and knowledge of its members, that the court will not feel required to instruct the jury that it must make such allowance.

The CMAS standard which the trial court applied is internationally recognized.[15] The trial court found that:

> CMAS has specific standards which describe the knowledge and skills required in order for a diver to be granted a CMAS one-star diver certificate.
>
> CMAS has a diver training program which indicates the current standard of training necessary in order to reach the minimum level of proficiency required for the award of a CMAS one-star diver certificate." (Findings of Fact Nos. 11 and 12.)

The trial court was not persuaded that an allowance should be made for local "variations" in the requisite skills of a scuba diving professional. Rather, it accepted the approach of plaintiff's dive expert who, in his evaluation of Macro's dive course, "measured it against what is considered to be normal by the five major training agencies in the world."[16]

The trial court concluded that "Yamagishi did not exercise reasonable care as a scuba instructor in certifying Ito as

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[15]"CMAS is a French agency which is internationally recognized around the world and issues a card certifying a diver as a CMAS one-star diver." Findings of Fact No. 7.

[16]R.T. Vol. VIII, p. 625:6-8. Also, the trial court found that "[t]he course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS." Finding of Fact No. 13.

an open water diver and a CMAS one star diver." Findings of Fact No. 14. This determination is supported by the evidence. *See Martinez v. Asarco Inc.*, 918 F.2d 1467, 1471 (9th Cir. 1990) (what duty is owed plaintiff is question of law for the court, but whether defendant breached that duty is ordinarily reserved for the trier of fact). There is no reason why the court should apply a standard different from that which defendants offered Ito: CMAS. We hold that the trial court applied the correct standard of care in evaluating defendants' conduct.[17]

5. The Plaintiff-Hirai Settlement Agreement.

On June 21, 1991, plaintiff offered to settle with defendant Hirai. Hirai claims he "unconditionally accepted" the offer on June 25, 1991. A day later, on June 26, plaintiff's counsel orally revoked the offer and, on June 27, sent a letter confirming withdrawal of the offer.

On September 12, 1991, Hirai filed a "Motion For Enforcement of Settlement Agreement." On May 22, 1992, the plaintiff filed a Pretrial Statement in which she noted that Hirai's motion to enforce the settlement agreement was filed but never set for hearing. On May 26, 1992, the first day of trial and just prior to counsels' opening statements, counsel for Hirai sought to argue the motion, but the trial court refused to hear it.

Defendant Hirai argues that the trial court abused its discretion in not hearing the motion for two reasons. First, Hirai argues, as a defendant he could bring his motion, which he contends was for summary judgment, "at any time." Com.R.Civ.P. 56(b). Hirai interprets this to mean

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[17]We do not imply that any diving standard which defendants may have offered would be acceptable. CMAS, which is one of the world's major dive training agencies, qualifies as an acceptable standard in the Commonwealth.

"including on the eve of, or even during trial." Hirai's Opening Brief at 44. As Hirai notes, some courts have allowed a defendant to bring its summary judgment motion on the eve of trial. For example, in *H.J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F.Supp. 452 (S.D.N.Y. 1960), the trial court allowed defendants to bring their summary judgment motion "on eve of trial," because such "may well have the salutary effect of narrowing the issues for trial." *Id.* at 459. In this case, however, Hirai's dismissal would not have "narrow[ed] the issues for trial."

The trial court possesses inherent power to police its docket, *Oliva v. Sullivan*, 958 F.2d 272 (9th Cir. 1992); *Edwards v. Cass County, Tex.*, 919 F.2d 273 (5th Cir. 1990). The timing of trials and docket control are matters best left to the discretion of the trial court. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329 (9th Cir. 1985), *corrected by* 773 F.2d 1049.

The trial court did not abuse its discretion in not hearing defendant Hirai's motion for summary judgment on the day of trial. Hearing the motion would have entailed continuing the trial to another day. A continuance would have required a shifting of the court's docket. Under the circumstances, we do not find an abuse of discretion by the trial court since the issue involved the court's control over its docket.

Hirai also argues that once a valid settlement is reached, the court's duty is to effectuate the intentions of the parties. This argument, however, addresses the underlying substantive issue of whether the settlement agreement is valid and enforceable as a matter of law. Since the trial court, however, made no ruling on the merits of this issue, we need not address it.

6. Plaintiff's Claim for Loss of Consortium.

American Home brought a motion for summary judgment relating to the coverage limits under its insurance

policy. In ruling on this motion, the trial court stated that "[p]laintiff admits, through her attorney, that she is no longer pursuing a claim for loss of consortium." *See* Memorandum Opinion dated April 16, 1991.

We agree with plaintiff's contention that the court erred in dismissing her claim based on her allegedly waiving such claim. We disagree, however, that she and her children are entitled to loss of consortium damages here.

Whether a claim for loss of consortium is considered derivative of a wrongful death claim or not, the common law does not recognize a cause of action for post-mortem loss of consortium. *Ladd v. Douglas Trucking Co.*, 523 A.2d 1301 (Conn. 1987); *Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R. Co.*, 335 N.W.2d 148 (Iowa 1983); *Selchert v. Lien*, 371 N.W.2d 791 (S.D. 1985); *Long v. Dugan*, 788 P.2d 1 (Wash. App. 1990), *review denied*, 791 P.2d 536. Instead, a jurisdiction's wrongful death statute usually provides the exclusive remedy for the decedent's beneficiaries. *Millican v. Wolfe*, 701 P.2d 107, 109 (Colo. App. 1985), *cert. dismissed*, 726 P.2d 647 (1986); *Ladd*, 523 A.2d at 1305; *Selchert*, 371 N.W.2d at 794. A deceased's spouse and children may recover for losses attributable to loss of love, affection and guidance, but only if there is a statute that permits such recovery.

In a well-reasoned opinion, *Reed v. Pacific Intermountain Express Co.*, 597 F.Supp. 42 (D.Conn. 1984), the court precluded plaintiff from recovering damages for loss of consortium after the death of her spouse. While acknowledging the policy reasons in favor of allowing the claim to proceed, it declined to do so because the Connecticut legislature failed to provide for loss of consortium recovery pursuant to its wrongful death statute. "[I]t is logical to assume that the passage of a wrongful death statute, creating a right of recovery unknown to the common law, was intended to preclude further judicial initiative." *Id.* at 45,

citing, Justus v. Atchison, 565 P.2d 122, 128 (Cal. 1977), *overruled on other grounds by, Ochoa v. Superior Court*, 703 P.2d 1, 9 (Cal. 1985). On certification from the United States District Court,[18] the Connecticut Supreme Court agreed with *Reed* and declined to recognize a right of recovery for post-mortem loss of consortium. *Ladd v. Douglas Trucking Co.*, 523 A.2d 1301 (Conn. 1987).[19]

The Restatement (Second) of Torts Section 925 provides:

> The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation.

Restatement (Second) of Torts Section 693 provides the rule for a spouse's right to recover for loss of society and services. *Comment f* explains that:

> In the case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this Section only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse *must recover, if at all, under a wrongful death statute.* (Emphasis supplied.)

Because the Commonwealth legislature has provided a statutory remedy for the beneficiaries of the victim of a wrongful death, we are not at liberty to create a right of action, not recognized at common law, for post-mortem loss

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[18]*Hume v. Hertz Corp.*, 628 F.Supp. 763 (D. Conn. 1986).

[19]Connecticut's wrongful death statute is not based on Lord Campbell's Act as is 7 CMC Section 2101 et seq. *See*, discussion below. Nevertheless, the *Ladd* court found that the legislature had fashioned the remedy for wrongful death in Connecticut. Loss of consortium was not a recoverable loss. Therefore, the court held that the only body which could provide a remedy for loss of consortium was the legislature.

of consortium in favor of the surviving spouse and children. Therefore, we go on to review our statute to determine whether it allows recovery for loss of consortium *as an element* of damages recoverable under our wrongful death statute. If it does, the court erred in precluding consideration of the alleged loss. If it does not, then the dismissal of the claim for loss of consortium was correct, but for the wrong reason.

Title 7 of the Commonwealth Code, Sections 2101-2103, provide that the decedent's personal representative may recover damages on behalf of a decedent's beneficiaries for wrongful death. Section 2101(a) provides:

> When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, . . . the [party] which would have been liable if death had not ensued . . . is liable to an action for damages notwithstanding the death of the person injured . . . .

Section 2103 provides:

> [T]he Court may award damages as it may think proportioned to the pecuniary injury resulting from the death, to the persons for whose benefit the action was brought . . . .

Our wrongful death statute stems from and is substantially the same as the Trust Territory wrongful death statute. *See*, 6 TTC 201-203. The Trust Territory High Court determined that this statute was fashioned after England's "Lord Campbell's Act"[20] meaning that "damages are limited to the pecuniary benefits which the beneficiaries might

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[20] See, for example, *Sea-Land Services, Inc. v. Gaudet*, 94 S.Ct. 806, 812 n.6 (1974) (*superseded by statute by, Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990)), where the Court sets forth the Lord Campbell's

reasonably be expected to have derived from the deceased had his life not been terminated. . . ." *Ychitaro v. Lotius*, 3 TTR 3, 17 (H.C.T.T. Tr. Ct. 1965); *see also, Sepeti v. Fitek*, 5 TTR 613 (H.C.T.T. Tr. Ct. 1972).

The Trust Territory High Court followed what the majority of states have adopted as the measure of damages applied in wrongful death actions: the "loss to dependents" measure. Dan B. Dobbs, Law of Remedies, § 8.4(3) (2d ed. 1993), *citing* at n. 6, *Freeman v. Davidson*, 768 P.2d 885 (Nev. 1989); *Calhoun v. Blakely*, 564 A.2d 590 (Vt. 1989). These damages are "measured by the support and amenities lost by the victim's dependents or beneficiaries . . . . Contributions made by the deceased from earnings or even from pension income reflect the loss under this measure." Dobbs, § 8.3(4) at 431. Whether loss of consortium damages are recoverable in the Commonwealth under this calculus is the issue we must answer.

Historically wrongful death damages were limited to "pecuniary" losses. Dobbs, § 8.3(5). As such, damages for loss of love and affection were not recoverable. Dobbs, § 8.3(5), *citing* at n.1, *Miller v. Mayberry*, 506 N.E. 2d 7 (Ind. 1987) (action for wrongful death of child). The purpose of the pecuniary loss rule was to prevent "extravagant" jury verdicts based on "sad emotions and injured feelings" instead of actual pecuniary loss. *Krouse v. Graham*, 562 P.2d 1022, 1026 (Cal. 1977).

Yet, "[m]ost jurisdictions now recognize the 'consortium' recovery for lost companionship, society, love, advice and guidance, either because those elements are considered 'pecuniary loss,' or because the statute specifically permits their recovery, or because the court has judicially discarded

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Act, 9 & 10 Vict., c. 93, An Act for compensating the Families of Persons killed by Accidents (Aug. 26, 1846).

the 'pecuniary loss' limitation." Dobbs, § 8.3(5) at 441 (footnotes omitted).[21]

For example, the California Supreme Court in *Krouse v. Graham*, 562 P.2d 1022, interpreted its wrongful death statute to allow the deceased's spouse to recover for the loss of his wife's "love, companionship, comfort, affection, society, solace or moral support [and] any loss of enjoyment of sexual relations." *Id.* at 1024.[22] It noted that "if damages were truly limited to 'pecuniary' loss, recovery frequency would be barred." *Id.* at 1026. Notwithstanding, we are constrained by the language of our statute.

The Commonwealth's wrongful death statute grants a cause of action vested in the decedent's personal representative. This cause of action creates a right to relief for damages caused to the "party [fatally] injured." The statute does not provide a right to relief for derivative injuries, such as loss of consortium, to the adult decedent's surviving spouse or children.

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[21]In a 1974 case, the Supreme Court noted that "27 of the 44 state and territorial wrongful-death statutes which measure damages by the loss sustained by the beneficiaries, permit recovery for loss of society. . . . California, Delaware, Michigan, Minnesota, Pennsylvania, Texas and the Virgin Islands, which either expressly or by judicial construction limit recovery to pecuniary losses have been judicially interpreted nevertheless, to permit recovery for the pecuniary value of the decedent's society." *Sea-Land Services, Inc. v. Gaudet*, 94 S.Ct. at 816, n.21.

[22]California Code of Civil Procedure section 377 provides for recovery in a wrongful death action for damages which are "just." Yet, the California courts allowed recovery of only "pecuniary losses" in a wrongful death action. *Krouse v. Graham*, 562 P.2d 1022 (Cal. 1977). The California Supreme Court labeled damages for loss of "society, comfort and protection" as "non-pecuniary" because they did not have an "ascertainable economic value." *In re Air Crash Disaster near Cerritos, Cal.*, 982 F.2d 1271, 1278 (9th Cir. 1992). Nevertheless, such damages are recoverable if they have pecuniary value. *Krouse*, 562 P.2d at 1025-26.

Loss of consortium is a claim for damages suffered by the non-injured spouse.[23] Our wrongful death statute allows only for recovery to the "party injured," that is, the deceased — not his spouse or children. *See, Hunt v. Evenoff*, 829 P.2d 1051, (Or. App. 1992), *review denied*, 836 P.2d 1344. ("A wrongful death action may be maintained only under circumstances in which 'the decedent might have maintained an action, had the decedent lived.' ORS 30.020(1)"). Thus, plaintiff's claim that she, as Mr. Ito's wife, and her children are entitled to damages based on loss of consortium fails. Our conclusion is fortified by the 1984 amendment to Section 2103[24] which eliminated the former $100,000 recovery limitation for wrongful death actions in the Commonwealth. The amendment indicates to us that, until our statute is further amended to permit recovery of damages for loss of parental and/or spousal consortium, the legislature apparently intended that such damages should remain unrecoverable. Plaintiff's loss of consortium claim therefore has no statutory basis, and the dismissal of the claim, although made for the wrong reason below, shall stand.

7. The Trial-Court's Calculation of Damages.

The trial court awarded plaintiff damages of $2,389,857.55 (plus burial expenses). Specifically, the trial court found that "[t]he income that [Ito] could have been expected to provide to his wife and children over his working life reduced to present value at an exchange rate of

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[23]The *injured* spouse has no claim for loss of consortium. *Atkins v. Strayhorn*, 273 Cal.Rptr. 231, 239 (Ct. App. 1990) (loss of consortium is a separate claim from a spouse's claim for personal injury). Similarly, assuming that we recognize a separate cause of action for loss of *parental* consortium for children, the cause would lie with the surviving children, not the injured or deceased parent.

[24]P.L. 4-16 (effective Oct. 24, 1984). *See*, Commission Comment to 7 CMC § 2103.

[Yen]126.78/$ is $2,389,857.55." *See* Findings of Fact No. 72.

Defendants argue that the trial court erred in two respects. First, the trial court failed to explain the approach it applied in calculating plaintiff's damages. Second, the trial court's actual calculation of damages is erroneous.

The two cases relied upon by defendants to support their argument that the trial court must explain its approach in calculating damages, *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984) and *Trevino v. United States*, 804 F.2d 1512 (9th Cir. 1986), *cert. denied,* 108 S.Ct. 70 (1987), were appeals involving allegedly "excessive" damage awards received by the respective plaintiffs under the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671 et seq. ("FTCA"). In both *Shaw* and *Trevino*, the Ninth Circuit held that damage awards under the FTCA are reviewed for "clear error." *Trevino*, 804 F.2d at 1514-15; *Shaw*, 741 F.2d at 1205.

The trial court's determination regarding damages is a finding of fact, and, as such, "shall not be set aside unless clearly erroneous." Com.R.Civ.P. 52(a); *Rees v. Ebetuer*, No. 90-017 (N.M.I. Jan. 29, 1992). Regarding the application of the clearly erroneous standard to damage awards, the court in *Trevino, citing Shaw*, 741 F.2d at 1205, wrote:

> The award is clearly erroneous if, after a review of the record, we are " 'left with the definite and firm conviction that a mistake has been committed.' " *Id. (quoting, United States v. United States Gypsum Co.*, [68 S.Ct. 525, 542] (1948)). To determine whether a given award is excessive, we look to the relevant state's case law on excessive awards. *Id.* The state of Washington considers awards excessive "only if the amount shocks the court's sense of justice or sound judgment" and if it "appears that the trial judge was swayed by

> passion or prejudice." *Id.* at 1209. To make that determination, we compare the challenged award to awards in similar cases in the same jurisdiction. *Id.* The choice of a discount rate, used to adjust to present value an award based on an income stream spread over time and, at the same time, to adjust for the effects of inflation, should be reviewed for an abuse of discretion. *Trevino*, 804 F.2d at 1515.

There is no Commonwealth case respecting excessive damage awards. We agree, however, with the approach taken by the courts of Washington state that a damage award should be considered excessive only if the amount shocks the court's sense of justice or sound judgment. *Harvey v. Wight*, 412 P.2d 335, 337-338 (Wash. 1966). We will also look to insure that the trial judge was not swayed by passion or prejudice. *Shaw*, 741 F.2d at 1209. If the damage award passes these subjective tests, then we will review for an abuse of discretion the trial court's choice of a discount rate, inflation rate, and any other figures used in calculating a present value award. *Trevino*, 804 F.2d at 1515. With these guidelines in place, we now turn to defendants' specific contentions regarding the damages awarded in this case.

First, defendants contend that the trial court erred in not revealing the figures it used to calculate the damage award. However, defendants acknowledge that the figures used by the trial court were "adopted verbatim from paragraph 70 of Plaintiff's Proposed Findings of Fact, and it is no surprise that both arrived at a figure of $2,389,857.55." Yamagishi's Opening Brief at 44-45.

The Ninth Circuit has criticized the adoption by the federal district courts of a party's proposed findings, and has stated that this practice requires "close scrutiny." *See, Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Int'l Ass'n of Machinist & Aerospace Workers*, 886 F.2d 1200, 1204 n. 5 (9th Cir. 1989) (en banc). In this

case, however, it was defendants who had the opportunity, but failed, to closely scrutinize the figures used by plaintiff's expert and, later, by the trial court. Plaintiff provided defendants with the name of her damages expert, Dr. Joseph L. Tryon, ten months prior to trial. Dr. Tryon was deposed in April 1992, over a month prior to trial, in lieu of his live testimony. Defendants therefore had Dr. Tryon's testimony in advance of trial. Indeed, at trial, defendants' damages expert attacked the figures used by Dr. Tryon, and on this appeal attack those same figures.

Given these facts and circumstances, we cannot say that the figures and method of calculating damages used by the trial court in determining damages were not known to defendants. The trial court's figures and calculations were not shrouded in mystery, but rather were the subject of debate in open court. Defendants were aware at all relevant times of the figures and calculations used by Dr. Tryon, and will not now be heard to say that the trial court's adoption of those same figures means that defendants have not been properly apprised of the figures or the court's method of calculating the damage award.

Second, defendants contend that the trial court's damage award is excessive and clearly erroneous. *See* Yamagishi's Opening Brief at 43. We do not find the trial court's damage award to be so excessive that it shocks our sense of justice or sound judgment. *Harvey*, 412 P.2d at 337-338. Also, we find nothing in the record which evidences that the trial judge was swayed by passion or prejudice. *Shaw*, 741 F.2d at 1209. Therefore, we will review the trial court's choice of figures in calculating the present value award for an abuse of discretion. *Trevino*, 804 F.2d at 1515.

Defendants essentially attack the twenty-one year time frame (1969-1990) used by Dr. Tryon (and followed by the trial court) to calculate a Japanese inflation rate of 9.46%.

Defendants contend that this rate is too high and not reflective of the contemporary Japanese economy.[25]

We therefore must determine whether the trial court abused its discretion in using the time frame and the resulting inflation rate suggested by Dr. Tryon. *Trevino*, 804 F.2d at 1515. In applying an abuse of discretion standard, we look to determine whether there has been manifest or gross abuse of discretion by the trial court. *Robinson v. Robinson*, No. 89-012 (N.M.I. Feb. 5, 1990).

Defendant Yamagishi notes:

> In his deposition, Dr. Tryon appeared to take Ito's salary in 1988 and increase it by 9.46% each year and every year until the year 2012, a twenty-four year period, to conclude that Ito's lost wages, less personal consumption expenses, would have amounted to $2,244,342.00, computed at an exchange rate of [Yen] 135 to the dollar and discounted to present value using an interest rate of 7.14%. (Yamagishi's Opening Brief at 45.)

This statement is not completely correct. Dr. Tryon calculated an annual inflation rate of 9.46% by looking to a twenty-one year average (1969-1990) of the Japanese "monthly earning index," which is "a combination of inflation and productivity advances roughly comparable to a combination of the United States consumer price index and the average monthly wage index."[26]

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[25]Restatement (Second) Torts Section 913A states:

The measure of a lump-sum award for future pecuniary losses arising from a tort is at the present worth of the full amount of the loss of what would have been received at the later time.

[26]Yamagishi's Brief at 45, *citing*, R.T. Vol. X, p. 782:1-13. Dr. Tryon used this rate of 9.46% even though his analysis of Ito's actual salary pattern over a 20-year period showed that Ito's salary had actually increased by 12.62% per year. Ito's Respondent's Brief at 39.

Defendants argue that if Dr. Tryon had used a shorter, more recent time frame, e.g. the last six years, then the Japanese inflation rate would be about 3%, thereby reducing the damage award by approximately $1 million. Yamagishi's Opening Brief at 45. Defendants cite *Trevino*, in which the court wrote that "it is impermissible to select a time period over which to compare inflation and interest rates that provides a decidedly aberrational result." *Trevino*, 804 F.2d at 1519.

The court in *Trevino* also wrote:

> We cannot deny history, nor can history provide an always reliable basis for predicting the future. However, we can base our estimates on long time periods that will diminish the effect of shorter aberrational periods. Fluctuations that are greater for a short time span are less dramatic, and skew results less, when they are seen as part of a longer period. We have no confidence in the ability of experts, the district court, or this court, to predict inflation or interest rates over the period of [plaintiff's] life other than extrapolating from the past. *Id.* at 1518.

We agree with defendants that, in the past few years, the Japanese economy has slowed, causing a decrease in the Japanese economic growth rates. However, like the court in *Trevino*, we deem the wiser approach is to look at the long term growth rates in order to "base our estimates on long time periods that will diminish the effect of shorter aberrational periods." *Id.*

Dr. Tryon and the trial court took such a long-term view, and used a time-reference of 1969-1990 to determine a Japanese inflation rate of 9.46%. While this rate of inflation

may seem high by American standards,[27] the evidence shows it is reasonable when viewed in the economic context of plaintiff's homeland: Japan. For these reasons, we hold that the trial court did not commit a manifest or gross abuse of its discretion in using a time frame of 1969-1990 to determine (and apply in its calculations) an inflation rate of 9.46%.

8. American Home's Liability Under the Policy.

On March 26, 1991, American Home filed a motion for summary judgment arguing that the extent of its liability is limited to $100,000, the "per person" limit under the subject American Home policy. On April 16, 1991, the trial court declared that coverage for Ito's death under the policy is limited to $100,000, rather than $300,000, the "per accident" limit under the policy. Ito and Yamagishi contend on appeal that the insurance policy limit is $300,000 for Ito's claim of wrongful death. We disagree and find no error.

A. The American Home Policy

The American Home insurance policy is a comprehensive general liability ("CGL") policy. At the center of this issue are two sections of the policy which relate to American Home's "limits of liability" — that is, the amount which American Home will pay to the insureds under the policy.

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[27]The court in *Trevino* noted that between 1926-1981, the average annual inflation rate in the U.S. "was around 3 percent." *Trevino*, 804 F.2d at 1518, *citing*, R. Ibbotson & R. Sinquefield, *Stocks, Bonds, Bills and Inflation* 15 (1982 ed.).

The first is Endorsement No. 1 to the policy, which states, in pertinent part:

LIMITS OF LIABILITY

It is hereby understood and agreed that the Limits of Liability of the Policy are as follows:

Bodily Injury:
$100,000 Per Person — $300,000 Per Accident

The second is the following language from a standard form attached to the policy (referred to herein as "Section III"):

III. LIMITS OF LIABILITY

> Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain bodily injury or property damage, or (3) claims made or suits brought on account of bodily or property damage, the company's [American Home's] liability is limited as follows:
>
> Coverage A [for Bodily Injury Liability] — The total liability of the company for all damages, including damages for care and loss of services, because of bodily injury sustained by one or more persons as the result of any one occurrence shall not exceed the limit of bodily injury liability stated in the schedule as applicable to "each occurrence." (Emphasis not supplied.)

As used in the policy, the term "occurrence" means an accident."

B. The Appellants' Arguments

Two arguments are raised on appeal. The first is presented by Appellant Yamagishi.[28] He asserts that the policy is ambiguous as to the meaning of the term "per person" used in Endorsement No. 1. A reasonable construction of the term "per person" includes a person making a claim or bringing suit which arises from someone's bodily injury. Thus, Mrs. Ito and her two children would constitute three such "persons" making three claims arising from Mr. Ito's bodily injury, and the policy therefore provides a total of $300,000 in coverage — $100,000 for each of the three claims. (Yamagishi's Opening Brief at 12.) This argument was not made to the trial court and is not properly before us, although it is addressed pursuant to the second argument raised on appeal. *Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo 1992) (en banc).

The second argument is presented by Ito with whom appellant Yamagishi joined below. Ito argues that the term "per person" is not defined in the policy. She also argues that Section III of the policy is the only limitation in the policy regarding American Home's liability on a single claim and that limitation is $300,000, not $100,000 as the trial court ruled.

Ito argues that the "per accident" limitation should apply because of an alleged ambiguity in the policy. Specifically, Ito contends that "since the main body of the policy has no reference to any limitation except $300,000, (per occurrence), the phrase 'per person' standing alone in the endorsement without any definition is meaningless or at a minimum, ambiguous." (Ito's Opening Brief at 26.)

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[28]For the insurance coverage issue only, defendant Yamagishi is represented by James H. Grizzard, Esq. of Saipan.

Ito has taken the position that the term "per person" and the attending limitation set forth in the endorsement should just be ignored. Alternatively, Ito suggests that the limiting term "per person" could mean "$100,000 per person insured, $100,000 per person making a claim, or even $100,000 [per] person suffering pecuniary loss just as easily as [the trial court's finding that the term means] $100,000 per person injured". Ito's Opening Brief at 32.[29] We find that none of Ito's proferred definitions of "per person" justify her claim that the higher "per accident" limitation should apply.

Appellants acknowledge that American Home's absolute limit of liability under the policy is $300,000 because there was only one "accident," and Endorsement No. 1 provides a maximum of $300,000 for any one accident. In so doing, Appellants acknowledge the validity of Endorsement No. 1 but not the correctness of the trial court's application of it to this claim.

1. One Claim was Made to American Home.

Appellant's alternative definitions for "per person" imply that valid claims were made by Ito's wife and two children. This is not the case.

Plaintiff, as personal representative of the deceased, proceeds in this action pursuant to a wrongful death statute. The decedent's beneficiaries' right to relief is solely provided by statute. Every wrongful death action in the Commonwealth "must be brought in the name of the personal

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[29]American Home, on the other hand, argues that (1) the term "per person" as used in Endorsement No. 1 is not ambiguous; (2) even if the term is ambiguous, the $100,000 limit must apply because appellants' alternative constructions are not "reasonable"; and (3) if we find, as appellants suggest, that "per person" means a person making a claim or bringing suit, "the $100,000 limit still applies because there was never more than one 'claim' or one 'claimant' before the court." *See* American Home's Respondent Brief at 4-5.

representative of the deceased, but shall be for the exclusive benefit" of the deceased's beneficiaries. 7 CMC § 2102. It is the personal representative who holds a single cause of action against those who are liable for the death of the deceased. *Horwell v. Oregon Episcopal School*, 737 P.2d 502, 503 (Or. App. 1990); *Huntington v. Samaritan Hospital*, 666 P.2d 405, 406 (Wash. App. 1983), *aff'd*, 680 P.2d 58 (1984).

We agree with California that an insurer is liable for the single claim of bodily injury to the decedent and not for the multiple non-bodily injury claims of the decedent's beneficiaries, whose damages resulted from the death. In *Westfield Ins. Co. v. DeSimone*, 247 Cal.Rptr. 291, 293, (Ct. App. 1988), the court reasoned:

> Defendants contend first that the trial court erred in ruling that each heir did not have a separate and distinct cause of action under Code of Civil Procedure section 377. Not so. In *Vanguard Ins. Co. v. Schabatka, supra*, 46 Cal.App.3d 887, 120 Cal.Rptr. 614, which the trial court expressly relied upon in making its ruling, this court rejected an argument almost identical to the one advanced by defendants in the case here, namely that the decedent's heirs 'were separately injured because of the death of their wife and mother and hence can together make claim on the multiple limits of the policy.' (*Id*, at p. 893, 120 Cal.Rptr. 614.) We reasoned, in *Vanguard*, that the heirs' claims did not constitute separate *bodily injuries* under the policy, but rather separate *elements of damages* flowing from the single bodily injury of the decedent. (*Id.*, p. 894, 120 Cal.Rptr. 614.) We then noted that in *Campbell v. Farmers Ins. Exch.* [67 Cal.Rptr. 175, 177 (1968), *overruled on other grounds by Moncharsh v. Heily & Blass*, 832 P.2d 899 (Cal. 1992)], Justice Tamura, writing for this court, had

> disposed of a similar contention by observing "'. . . where only one person was killed in an accident, the policy limit was $10,000 [the single injury limit] regardless of the number of heirs damaged.'"

See also, United Services Automobile Ass'n v. Lilly, 266 Cal.Rptr. 691 (Ct. App. 1990); *Vanguard Ins. Co. v. Schabatka*, 120 Cal.Rptr. 614 (Ct. App. 1975).[30]

Here, there is but one claim for bodily injury, that of the decedent. Only Mr. Ito's personal representative (Mrs. Ito) may recover for that single claim on behalf of herself and the two children, his three beneficiaries. The decedent's wife and two children do not have separate claims against American Home's insureds for the death of Mr. Ito. Moreover, as noted in our discussion in Section 6 above, Mrs. Ito and her children do not have a separate claim for loss of consortium against the negligent defendants.[31] Their sole source of relief is based on the statutory wrongful death claim. Thus, since they have no right to insurance proceeds other than through the claim of Mr. Ito's personal representative, it is Ito's bodily injury upon which liability attaches.

2. The Policy Is Not Ambiguous

A policy will be enforced according to its terms by reading it as a whole. *Producers Dairy Delivery Co. v. Sentry*

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[30]We reject plaintiff's assertion in *Westfield*, (and other cases such as *United Services* and *Vanguard*) are inapplicable here. It is true that the policies involved in those cases are distinguishable from the policy here. Nevertheless, the holding that an insurer is liable on a claim for the single bodily injury of the decedent rather than multiple non-bodily injury claims of the decedent's heirs applies here despite the difference in policy language. Any other result would be untenable.

[31]We do not decide whether loss of consortium is or is not a "bodily injury" for purposes of coverage liability. Under the circumstances here, the decedent's heirs do not have a right to damages for loss of consortium.

Insurance Co., 718 P.2d 920, 927, n.7. (Cal. 1986); *United Services Automobile Ass'n.*, 266 Cal.Rptr. at 692. The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage. *Aim Ins. Co. v. Culcasi*, 280 Cal.Rptr. 766, 771 (Ct. App. 1991), *review denied.*

Endorsement No. 1's "per person" limitation of $100,000 is not ambiguous. Simply because a term is not defined does not render it "ambiguous" as plaintiff asserts. It will be afforded its plain and ordinary meaning "against the background of a layman's understanding of the entire policy." *Ayres v. Prudential Ins. Co. of America*, 602 F.2d 1309, 1311 (9th Cir. 1979); *Aim Ins. Co.*, 280 Cal.Rptr. at 771.

American Home stated that its limit of liability is $100,000 "per person" for "bodily injury." Only one person suffered bodily injury.[32] That person is Ito, the decedent. Because there is only one bodily injury (death), the limit of liability is $100,000, regardless of the number of heirs claiming damages due to that death.

Even Ito's lawyer admits: "I mean, we deal with these things all the time so, to us, per person, of course, that means the person injured, to a lawyer, but a lay person, unless he is specifically given a definition in the policy, that's what all the cases seem to say." (Tr. April 4, 1991, p.49:20-24.) We disagree and finding nothing technical or ambiguous about the term or its application.

Section III of the policy is also not ambiguous: American Home's total liability is limited to $300,000, the "per accident" limit, "[r]egardless of the number of . . . claims made . . . on account of bodily injury . . . ." Ito contends that "[t]his policy specifically says we don't care how many

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[32]American Home does not dispute that the fatal injuries suffered by Ito constitute "bodily injury" under the policy.

people were injured, we will — we don't care how many beneficiaries there are and anything else, all we care about is that if it's one person or five persons, the maximum amount of money that we will pay is $300,000." (Tr. April 4, 1991, p.53:16-22.)

Ito focuses on the word "regardless" and asserts that the term means that American Home must pay the "per accident" limit for the single claim made here.[33] We find nothing ambiguous about the meaning of this provision or the term "regardless." Contrary to plaintiff's assertion, this section was drafted to cap American Home's liability at $300,000 where claims for more than three separate bodily injuries involved in one accident are being made and "total" damages exceed $300,000. Section III's meaning is plain, understandable and reasonable. To rule that this provision sets the limit of liability in this case at $300,000 where there is only one person injured simply because there are three beneficiaries would amount to a "strained" construction of an otherwise reasonably worded provision. *Rodriguez v. Safeco Ins. Co. of America*, 821 P.2d 849, 851 (Colo. 1991), *cert. denied; Klamm v. Carter*, 730 P.2d 1099, 1101 (Kan. App. 1986).

Read together, the American Home policy provides coverage of up to $100,000 for a valid claim for damages based on one bodily injury. The policy also provides coverage of up to $300,000 "per accident" no matter how many persons are injured in a particular accident. The plaintiff's contentions that the policy is ambiguous and that the "per accident" limits also applies to a single claim are without merit. Only one claim based on one bodily injury could properly be made by the personal representative of the decedent. American

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[33]Ito argues that Section III's term "regardless" is significant in defining policy limits: "It says regardless of the number of persons who sustained bodily injury, regardless of the number of persons. It could be one or it could be five." (Tr. April 4, 1991, p.47:17-19.)

Home is liable for coverage of that claim in the amount not to exceed $100,000. We therefore hold that the trial court did not err in entering summary judgment in favor of American Home.

V. CONCLUSION.

For the foregoing reasons, we hold that:

1. The release is invalid and failed to exonerate any of the defendants from liability for their negligence;

2. Ito did not impliedly assume the risk of harm arising from defendants' conduct;

3. Ito was not contributorily negligent;

4. The trial court applied the correct standard of care in evaluating defendants' actions;

5. The trial court did not err in denying Hirai's motion for summary judgment based on Hirai's settlement agreement with plaintiff;

6. The trial court did not err in dismissing plaintiff's loss of consortium claim, but did so for the wrong reason;

7. The trial court did not err in its calculation of damages. Further, there was a sound basis for the damages awarded;

8. The trial court did not err in ruling that the coverage provided by the American Home insurance policy was limited to $100,000.

This case is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED to the trial court for the limited purpose of (1) entering an amended judgment against Macro, Yamagishi and Hirai, jointly and severally, in the amount of $2,434,857.55 and (2) determining whether MOE should be held jointly and severally liable to plaintiff based on the theory that MOE is the "alter ego" of

Macro. If the trial court determines that MOE is the alter ego of Macro, it should also enter judgment against MOE, jointly and severally with the other defendants.

Dated at Saipan, MP, this 26th day of October, 1993.

JOSE S. DELA CRUZ,
Chief Justice

RAMON G. VILLAGOMEZ,
Associate Justice

BENJAMIN J.F. CRUZ,
Special Judge

APPENDIX I

APPENDIX I

93 NOV 23 A| | : 2
BY: _____

APPEAL NOS. 92-020 & 92-022
(Consolidated)
CIVIL ACTION NO. 89-918

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of
the Heirs of AKINOBU ITO, Deceased,
Plaintiff/Appellee/Cross-Appellant,

v.

MACRO ENERGY, INC.,
MARIANAS OCEAN ENTERPRISES,
NOBUO HIRAI, SHIGEMI YAMAGISHI, and
AMERICAN HOME ASSURANCE COMPANY,
Defendants/Appellants/Cross-Appellees.

ORDER DENYING A RE-HEARING

BEFORE: DELA CRUZ, Chief Justice; VILLAGOMEZ, Justice; and CRUZ, Special Judge

We have reviewed the two petitions for rehearing filed by appellants Macro Energy, Inc. ("Macro") and Shigemi Yamagishi, and by Nobuo Hirai. After reviewing their memoranda in support of rehearing, we are not persuaded that we have overlooked or misapprehended the pertinent points of law or fact. Com.R.App.Pro.40.

In particular, Macro's contention that its due process rights were violated is without merit. While it is true that a

corporation is a distinct "jural entity," we disagree with the assertion that Macro is entitled to a full trial on the issues of negligent conduct and liability before judgment may be entered against it, for here, it was being sued on *respondeat superior* grounds.

Macro's petition fails to address *why* it should not be held liable to the plaintiff for the negligent acts of Yamagishi and Hirai (its employees and agents) on the theory of *respondeat superior*. While Macro states that "it could have amended its answer" to allege that Yamagishi and Hirai acted outside the scope of their employment with regard to Ito's death (Macro/Yamagishi Brief at 13), it does not assert a position that either Hirai or Yamagishi *acted* outside the scope of their employment, much less provide any factual predicate to support such a proposition. Macro's petition merely reasserts most of the issues that have been considered and resolved at trial and on appeal, i.e. whether Yamagishi and Hirai negligently caused the death of Akinobu Ito.

Hirai's due process argument regarding the issue of the settlement agreement is being raised for the first time in his petition for re-hearing. We shall not address this issue which was not raised below or earlier with us. *In re Estate of DeLeon Guerrero*, 1 N.M.I. 325, 326 n.2, No. 89-017, slip op. at 2 n.2 (N.M.I. Aug. 24, 1990) (Order Denying Petition for Rehearing).

The petition for re-hearing, therefore, is DENIED.

Dated at Saipan, MP, this 23rd day of November 1993.

JOSE S. DELA CRUZ,
CHIEF JUSTICE

RAMON G. VILLAGOMEZ,
ASSOCIATE JUSTICE

BENJAMIN J. F. CRUZ,
SPECIAL JUDGE

APPENDIX J

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JULY 21 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 94-15186
DC# CV-92-00020
Northern Marianas Is.

RYOKO ITO, as Personal Representative of the Heirs of Akinobu Ito, Deceased,
Plaintiff-Appellee,
vs.
MACRO ENERGY, INC., et al.,
Defendants-Appellants.

No. 94-15188
DC# CV-92-00020
Northern Marianas Is.

RYOKO ITO, as Personal Representative of the Heirs of Akinobu Ito, Deceased,
Plaintiff-Appellee,
vs.
MACRO ENERGY, INC.,
Defendant,
and
NOBUO HIRAI,
Defendant-Appellant.

ORDER

Before: FARRIS, KOZINSKI and NOONAN, Circuit Judges

Appellants' motions for stay pending appeal are denied. Moreover, because this is not a case "involving the Constitution, treaties, or laws of the United States," these appeals are dismissed for lack of appellate jurisdiction. 48 U.S.C. § 1694c(a); *Sablan v. Manglona*, 938 F.2d 970 (9th Cir. 1991).

FILE COPY

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
121 Spear Street, P.O. Box 193939
San Francisco, CA 94105-3939

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the Court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion.

PETITION FOR REHEARING (FRAP 40)

Filing Time: A petition for rehearing may be filed within fourteen (14) days after judgment.

Purpose: A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel.
3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

Petitions which merely reargue the case shall not be filed.

Statement of Counsel: A petition shall contain an introduction stating that in counsel's judgment, one or more of the situations described above (in Purpose Section) exist. The points to be raised must be clearly stated. Lacking such a statement, the petition will not be filed.

Form: The fifteen (15) page limit allowed by the rule must be observed. Please use 8½ × 11 inch paper. Three (3) copies of the petition and the original are required UNLESS the petition includes a suggestion for rehearing en banc. If it does, thirty-three (33) copies and the original must be filed.